UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CYRIL B. KORTE, JANE E. KORTE, and KORTE & LUITJOHAN CONTRACTORS, INC.,

Plaintiffs,

v.

Case No. 3:12-cv-01072-MJR-PMF

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the U.S. Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor,

Judge Michael J. Reagan

Defenda nts
_____/

***AMICUS CURIAE* BRIEF OF LIBERTY, LIFE AND LAW FOUNDATION IN SUPPORT OF PLAINTI FFS' MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs Cyril and Jane Korte, owners of a controlling interest in Korte & Luitjohan Contractors, Inc., are devout Catholics who hold to their Church's teachings about the sanctity of life and the grave immorality of abortion, contraception, and sterilization. The preventive services coverage regulations of the Patient Protection and Affordable Care Act (the "Act"), requiring them to include contraception and other objectionable services in their employee health insurance plan (the "Mandate" or "HHS Mandate"), places them in an untenable position: They must either violate their most cherished convictions by complying with the Mandate, or face draconian economic penalties.

Plaintiffs have included a more comprehensive statement of the facts in the Memorandum of Law supporting their Motion for a Preliminary Injunction.

INTRODUCTION

The First Amendment has never been confined within the walls of a church, as if it were a wild animal that needs to be caged. On the contrary, the Constitution broadly guarantees religious liberty to individuals, like Cyril and Jane Korte, who participate in public life according to their deeply held moral, ethical, and religious convictions. .

But now, under the Act, Plaintiffs' family owned company must provide health insurance to company employees *and* that program must include contraception, sterilization, and related educational/counseling services, all in violation of the Kortes' Catholic faith. This Mandate tramples the conscience of a multitude of business owners and religious organizations by requiring them to finance drugs and services contrary to their most cherished religious beliefs. It is a frontal assault on liberties Americans have treasured for over 200 years.

Some contend that failure to comply with the Mandate constitutes discrimination against women. That argument is a rabbit trail diverting attention from the heart of this case: liberty of conscience. Refusal to advance a politically charged agenda is not "discrimination," particularly since no person has a right to *free* contraception funded by an unwilling private employer.

ARGUMENT

I. RESPECT FOR INDIVIDUAL CONSCIENCE IS DEEPLY ROOTED IN AMERICAN HISTORY.

The American legal system has traditionally demonstrated a high regard for conscience. For example, statutory and judicially crafted exemptions have long recognized the moral dilemma created by mandatory military service. One case, recognizing man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to systematically run roughshod over the conscience of its citizens, but that is exactly what the HHS Mandate does. The sheer number of pending lawsuits testifies to the gravity of the matter.

"Rights of conscience" encompasses even more than the "free exercise of religion"—but the First Amendment explicitly guards religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990). Many state constitutions link free exercise to "liberty of conscience." A Minnesota court, ruling in favor of a deli owner who refused to deliver food to an abortion clinic, noted that: "Deeply

rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993).

The right of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011) (discussing *Flast*), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: The Mandate requires citizens like the Kortes to violate conscience and religious faith by financing activities they believe to be immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to violate conscience by supporting religious beliefs they do not hold.

In the health care industry, there is a history of judicial and legislative respect for conscience—respect that should be extended to the private employers who must now pay for their employees' health insurance. Patients and doctors both have rights to moral autonomy. Women may have a legal right to contraception and abortion, but on the professional side, "to demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients." J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002). The HHS Mandate has a corrosive effect on American society, compelling numerous business owners and even religious organizations to violate conscience by paying for services they believe are immoral.

After abortion became legal, Congress acted swiftly to protect the conscience rights of health care professionals who object to participating in abortions. When Senator Church

introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that: "Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 627-628 (2006) ("*Lessons From Pharaoh*"). Almost every state has also enacted conscience clause legislation. Courtney Miller, Note: *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 331 (2006) ("*Reflections*").

This Court's decision has broad ramifications for others burdened by legal directives to act against conscience. It is difficult to pinpoint the myriad of situations where legal mandates may invade rights of conscience. In light of the high value the American legal system has historically assigned to conscience and religious liberty, it is incumbent on this Court to protect the rights of those who decline to finance medical services they find morally objectionable.

II. AN EMPLOYER'S REFUSAL TO FINANCE CONTRACEPTION AND/OR ABORTION IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION PROHIBITED BY THE CONSTITUTION.

Some supporters of the Mandate reframe the issue in terms of discrimination against women. But expansive modern anti-discrimination principles increasingly collide with religious liberty. Commentators have observed the legal quagmire in the context of statutory protections:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in*

Conflict: The Price of a Ma turing Democracy, 77 N.D. L. Rev. 27, 29 (2001); David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Korte & L uitjohan does not disc riminate against female employees. Contrace ption represents only a fraction of the health care se rvices unique to wom en. Most of these services are not m orally objectionable, e.g., childbirth, prenatal care, m ammograms, pap s mears, and treatments for breast or cerv ical cancer. The com pany has carved out only those services it cannot in good conscience facilita te or finance. Seen against the backdrop of common law principles and the First Amendment, that conduct is not unlawful discrimination.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating Th e Legal Analysis And Tr iggering Collisions With The First Amendment.

Antidiscrimination policies have an cient roots. Under common law, a public ente rprise had a duty to serve all custom ers on reas onable terms. The Massachusetts public accommodations law in *Hurley* grew out of the common law principle that innkeepers and others could not refuse service to a customer without good reason. *Hurley v. Ir ish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571 (1995). But lik e other states across the country, the Massachusetts legisl ature broadened the scope, a dding more protected categories and more places subject to the law. *Id*. at 571-572. The sam e trend was apparent in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even m embership associations—increasing the po tential for collisions with First Am endment association rights. *Boy Scouts of America v. Dale* , 530 U.S. 640, 656 (2000). Prot ection also expanded, adding criteria such as prior crim inal record, prio r psychiatric treatm ent, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656 n. 2.

Similarly, California's Unruh Act (Cal. Civ. Code § 51) originally encompassed "inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement." Stats. 1897, ch. 108, p. 137, § 1, cited in *In re Cox*, 3 Cal.3d 205, 213 (1970). The reach of the Act expanded over the years to cover more places and people: *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734 (1951) (race track could not expel man of immoral character); *Stoumen v. Reilly*, 37 Cal.2d 713 (1951) (homosexuals may obtain food and drink at a public restaurant). What the Act clearly forbids is the "irrational, arbitrary, or unreasonable discrimination" prohibited by the Equal Protection Clause of the Fourteenth Amendment. *In re Cox*, 3 Cal.3d at 216. Discrimination is "arbitrary" where an entire class of persons is excluded without justification. *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721 (1982). But it is hardly "arbitrary" to avoid promoting an agenda. *Hurley*, 515 U.S. 557 (parade organizers were not required to grant access to a gay organization). When Unruh Act amendments were considered in 1974, the Legislative Counsel cautioned that "a construction of the act that would prohibit discrimination on any of the grounds enumerated therein *whether or not such action was arbitrary* would lead to *absurd results*." *Isbister v. Boys Club of Santa Cruz*, 40 Cal.3d 72, 87 (1985) (emphasis added).

The Supreme Court has rightly upheld civil rights legislation intended to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

Michael W. McConnell, *"God is Dead and We have Killed Hi m!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Political power can be used to squeeze religious views out of public debate over controversial social issues. *Id*. at 188.

The clash between anti-discrimination principles and the First Amendment is particularly volatile when a morally controversial practice is protected and religious groups are swept within the ambit of the law. Governm ent has no right to impose a particular moral view on religious entities and citizens w ho want to conduct b usiness in accordan ce with their deeply hel d convictions. Powerful religious vo ices have shaped views of sexual m orality for cen turies. These views of right and wrong "are not trivia l concerns but profound and deep convictions accepted as ethical and moral principles." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

Both courts and commentators observe the potential collision of rights. The clash between non-discrimination rights and religio us liberty "places a c omplex legal question involving competing societal values squarely before the courts." *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 887. One D.C. Circuit case addressed the question "of im posing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such m atters. The First Am endment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 24 (D.C. 1987) (em phasis added). Non-discrim ination rights, whether created by statute or derived from equal protection or due proce ss guarantees, may conflict with established constitutional rights to religious liberty, and courts m ust determine which right prevails under particular circumstances. *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and nondiscrimination principles emerges in a broad range of contexts. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 224-225. Employers may find themselves in a conundrum —protecting one group of employees while alienating another. The answers are not always easy, particularly in the wake of expanding privacy rights. But even if private sexual conduct is legally protected from government intrusion, that protection does not trump the First Amendment speech and religion rights of those who cannot conscientiously endorse it—*let alone finance it*.

B. Many Decisions Necessitate Selection Criteria.

Discrimination may or may not be invidious—and thus rightly circumscribed—depending on the context and the identity of the person or group who discriminates. Everyone experiences discrimination. Employers "discriminate" in selecting employees from a pool of applicants. Students are subjected to discrimination—admission, honor rolls, sports teams. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Where selection criteria are truly irrelevant, protection may be proper. But it is impossible to eradicate all discrimination.

C. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Action motivated by conscience and deeply held religious convictions is not arbitrary, irrational, or unreasonable. It is not the unlawful discrimination the Constitution prohibits.

The law may proscribe the refusal to conduct business with an entire group based on personal animosity or stereotypes. But the First Amendment demands that courts seriously consider religious motivation. In the unemployment cases, the Supreme Court has held that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit *hostility, not neutrality, towards religion*." *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 142 (1987) (emphasis added); *Thomas v. Review Bd. of Ind. Employment*, 450 U.S.

707, 708 (1981). Similarly, this Court would exhibit hostility toward religion by equating the Kortes' religious objections to the Mandate with unlawful "discrimination."

Motivation is a key factor. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a religious person who wants to live—yet refuses treatment based on religious convictions—does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. The same act—premeditated with malice—is first degree murder. The former carries no legal penalties; the latter warrants severe consequences.

Cutting through the fog demands examination of the circumstances. Anti-discrimination laws rightly protect against refusing a customer on the basis of a truly irrelevant personal characteristic. But a deli owner's refusal to deliver food to an abortion clinic was *not* unlawful discrimination under applicable state law, because he opposed their practice of performing abortions. *Rasmussen v. Glass,* 498 N.W.2d at 510-511.

D. A Narrowly Crafted Exemption Would Not Constitute The Arbitrary, Unreasonable Discrimination The Constitution Rightly Prohibits.

There are no allegations that Korte & Luitjohan discriminates against women in its hiring, compensation, or other policies. But it cannot comply with the Mandate without sacrificing allegiance to its core convictions. General anti-discrimination principles should not be applied expansively so as to directly burden the Korte Plaintiffs' First Amendment rights. The Mandate extends far beyond the "meal at the inn" promised by common law and encroaches on the right of a private employer to conduct business without compulsion to violate conscience. Similarly, when the Supreme Court rejected a 400-member dining club's facial challenge to a state anti-discrimination law, it recognized that the state could not prohibit the exclusion of members whose views conflicted with positions advocated by an expressive association. What

the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 13 (1988). Here, Korte & Luitjohan uses no "shorthand" to discriminate against women, but rather objects to funding a narrow range of morally objectionable services.

III. THE RIGHT TO ACCESS CONTRACEPTION DOES NOT JUSTIFY COERCED FUNDING BY UNWILLING PRIVATE EMPLOYERS.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ("*Barnette*"). Similarly, the government has no power to force a *speaker* to support or oppose a particular viewpoint. *Hurley*, 515 U.S. at 575. Religious liberty collapses when secular ideologies employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 186-188. It grates against the Constitution for the government to coerce private approval and/or funding for contraception or abortion rights.

The Mandate essentially bans religious believers from full participation in society. A state mandate to engage in conduct a citizen considers immoral is tantamount to a statement that "no religious believers who refuse to do [X-sinful act] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573.

Even though courts have acknowledged constitutional rights to contraception and abortion, there is no corollary right to compel unwilling private business owners or ministries to finance the exercise of those rights. In the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court left intact Georgia's statutory protection for persons who object to abortion:

> A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not

> be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

Doe v. Bolton, 410 U.S. 179, 205 (1973) (quoting from Ga. Crim. Code § 26-1202(e) (1968). The HHS Mandate compels a private employer to become a "de facto accomplice" to a morally objectionable agenda. Pregnant women with the legal right to abortion have no accompanying right to draft their employers as unwilling accomplices who must pay for it. In this "clash of autonomies," private business owners and ministries have a "right to choose" and are entitled to equal protection of that right. *Reflections*, 15 S. Cal. Rev. L. & Social Justice at 340-341, 344.

A. Abortion Is A Highly Controversial, Divisive Issue.

This Court must protect the rights of *all* citizens. Americans on both sides of the abortion/contraception debate are equally entitled to constitutional protection. The government itself may adopt a position, but it falls off the constitutional cliff when it compels private employers to finance morally objectionable services contrary to conscience. The reproductive rights recognized in recent decades do not trump the inalienable First Amendment rights of citizens who cannot in good conscience support abortion (and/or contraception)—let alone finance it for others.

Many deeply religious people view abortion as fundamentally wrong. Many state laws regulate it—informed consent, parental notice, waiting periods, and other statutory limitations. The resulting legal challenges are legion. But the very fact that such restrictions have been proposed and passed is evidence that Americans are profoundly troubled and deeply divided. Some, like the Kortes, object to an even wider range of reproductive services.

Even if this case were truly about discrimination against women—rather than conscientious objection to a narrow range of services—the contentious nature of abortion

distinguishes this case from *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) (tax-exempt status denied to racially discriminatory school). The activities of a charitable organization must not be "contrary to settled public policy" (*id.* at 585) and there is a "firm national policy to prohibit racial segregation and discrimination in public education" (*id.* at 593). That policy justified the decision to deny charitable status to a racially discriminatory school. There is no comparable policy about abortion—but rather intense division and passionate emotion as the debate rages on.

B. Religious Freedom Is Our *First* Liberty—It Should Not Be Dismantled To Coerce Private Funding Of Abortion Rights.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. The Supreme Court expressed it eloquently when it ruled that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. 61, 68 (1946). We dare not sacrifice our priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden access to contraception. Although abortion proponents have gained wider public acceptance, pro-life advocates have not forfeited their right to conduct their lives in line with their convictions.

C. No Person Has A Constitutional Right To *Free* Access To Contraceptive Services—Through Coerced Employer Funding Or Otherwise. Accommodation Of A Private Employer's Conscience Poses No Threat To Any Employee's Legal Rights.

Even the government has no obligation to "commit any resources to facilitating abortions." *Webster v. Reproductive Health Services,* 492 U.S. 490, 511 (1989); *see also Bowen v. Kendrick,* 487 U.S. 589, 596-597 (1988) (Adolescent Family Life Act restricts funding to "programs or projects which do not provide abortions or abortion counseling or referral"). The state may prefer childbirth and allocate scarce resources accordingly. *Harris v. McRae,* 448 U.S. 297, 315 (1980); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). The government's sole obligation is not to impose "undue interference" on abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). Accommodation of a private employer's conscience imposes no burden on any employee—but the Mandate does impose "undue interference" on the employer's constitutional rights.

Private individuals and organizations have an affirmative constitutional right to oppose abortion and decline to fund it, free of government intrusion. The government cannot impose a particular view of sexual morality on those who want to be left alone to operate their businesses and ministries according to their convictions. The Constitution bars any public official from prescribing orthodoxy in religion. *Barnette*, 319 U.S. at 642. The Mandate strays even further from the First Amendment, brazenly exhibiting the "callous indifference" to religion never intended by the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id*.

Some advocates argue that courts must balance conflicting interests and not necessarily accommodate religion where the rights of third parties are detrimentally affected. *Catholic*

Charities of Sacramento, Inc. v. Superior Court, 32 Cal.4th 525, 565 (2004); *Catholic Charities of Diocese of Albany v. Seri*, 7 N.Y.3d 510, 518 (N.Y. 2006) (same). Some earlier free exercise cases did not implicate third party rights, so it was unnecessary to balance competing rights. *Sherbert v. Verner*, 374 U.S. 398 (1963) (and other unemployment cases); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parental rights to educate children). In other cases, courts have denied religious exemptions where an accommodation would endanger minor children and/or community health. *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Walker v. Superior Court,* 47 Cal.3d 112 (1988) (parental failure to seek medical treatment for child). In these cases, the restriction on religious liberty was narrow and the religious conduct "invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403. In other cases, courts have considered the nature and extent of infringement on third party rights. The Jaycees and Rotary lost free association claims because they could not show that their organizational expression was actually hindered by admitting female members. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

More recently, association rights have trumped statutory anti-discrimination rights. *Hurley*, 515 U.S. 557; *Boy Scouts of Am. v. Dale*, 530 U.S. 640. This Court cannot brush aside the Kortes' conscientious objections to the Mandate without flouting the *Hurley* and *Dale* precedents Protecting reproductive rights does not justify compelling employers to disregard their deepest convictions—risking financial ruin or professional displacement. That is particularly true in the absence of any employee's right to free contraception financed by a private employer.

D. Other Cases Limiting Religious Freedom In The Commercial Sphere Left The Objector With A Viable Choice. The HHS Mandate Does Not.

Cases involving comparable legal mandates provide some avenue of escape:

- Religious charities required to include contraception in their prescription drug plan could simply discontinue all coverage for drugs. *Catholic Charities of Sacramento*, 32 Cal. 4th at 540; *Catholic Charities of Diocese of Albany*, 7 N.Y.3d at 527.
- A religious school could discontinue its employee health insurance program altogether in order to comply with its religious conviction that only male employees should be offered this benefit. *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).
- A religious school offering supplemental pay to heads of household could discontinue the program altogether. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).
- A religious school could continue to operate, but without the benefits of tax-exempt status. *Bob Jones Univ. v. U.S.*, 461 U.S. at 603-604.
- Students who object to using mandatory registration fees for insurance that covers abortion could presumably enroll in some other university—perhaps a religious institution. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Erzinger v. Regents of Univ. of Cal.*, 137 Cal. App. 3d 389 (Cal. Ct. App. 1982).

These "solutions" are counter-productive, harming numerous third parties and restricting access to goods and services. Elimination of health insurance harms *all* employees, including the female employees in the *Catholic Charities* cases and *Fremont Christian School*.

But these alternatives—undesirable as they are—pale in comparison to the draconian Mandate, which leaves larger employers with virtually no escape hatch. Employers may avoid the Mandate only by keeping employee numbers down—resulting in a loss of jobs and loss of potential insurance benefits—contrary to the purpose of the Affordable Care Act. The Mandate

ultimately restricts access to pub lic goods and services and stalls economic growth by forcin g conscientious employers to restrict the size of their operations or shut down altogether.

IV. BELIEVERS DO NOT FORFEIT THEI R CONSTITUTIONAL RIGHTS WHEN THEY ENTER THE COMMERCIAL SPHERE.

If believers—*and even religious organizations*—must abandon their moral principles in the public square, there is a real danger they will be squeezed out of full participation in civic life or even destroyed. *Lessons From Pharaoh*, 39 Creighton L. Rev. at 561-563. Religion does not end where daily business begins. Moral precepts cannot be relegated to an obscure corner of life, removed from the public realm . If relig ion is shoved to the private fringes, co nstitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176.

Many free exercise cas es arise in th e context of comm ercial activity: *Braunfeld v. Brown,* 366 U.S. 599 (1961) (Sunday closing); *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases); *United States v. Lee* , 455 U.S. 252 (1982) (Amish business); *Roberts v. United States Jaycees*, 468 U.S. 609 (comm ercial association); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985); *State ex rel. McClure v. Sports & Health Club, Inc.,* 370 N.W.2d 844, 853 (Minn. 1985) (hiring); *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery); *Swanner v. Anchorage Equal Rights Commission,* 874 P.2d 274 (Alaska 1994) (housing); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994) (same, remanded for "compelling interest" analysis); *Catholic Charities of Sacramento*, 32 Cal.4th at 565.

The state actively regulates commerce but has minimal control over the internal affairs of religious entities, so it is no surprise that these conflicts occur more often in commercial settings. Some of the cases cited were succes sful (*Sherbert, Rasmussen, Desilets*), while others were not (*Braunfeld, Lee, Roberts, Pines, Alamo F dn., McClure, Swanner, Catholic Charities*). The "commercial" factor is one of many considerations and does not determine the outcome.

But with the advent of the draconian Mandate, even the church sanctuary provides no safe haven from the strong arm of the state.

United States v. Lee is frequently cited to oppose religious exemption claims in the commercial sphere. *Catholic Charities of Sacramento,* 32 Cal.4th at 565. But *Lee* does not hold that believers shed their constitutional rights altogether in the business world:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm but not abrogated altogether. Indeed, cases arising in a commercial setting cannot be dismissed because a religion does not expressly require the commercial activity:

> [F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the *effect* of significantly burdening a religious practice.

Employment Div., Ore. Dept. of Human Res. v. Smith , 494 U.S. 872, 894 (1990) (O'Connor, J., concurring). In light of the well-publicized controversy surrounding abortion in the decades since *Roe v. Wade*, the Mandate flagrantly burdens religious business owners and organizations by compelling them to finance services they believe are immoral.

V. IRONICALLY, THE MANDATE WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING THOSE WHO ADVOCATE IMPOSING IT ON UNWILLING PRIVATE EMPLOYERS.

The right to freely access contraception and abortion is a relatively recent development in American jurisprudence. Advocates accomplished this dramatic social and political transformation by exercising basic constitutional rights such as free speech, press, association, and the political process generally. Similarly, the status of various minorities has improved

dramatically because the Constitution guarantees free expression and facilitates the advocacy of new ideas. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 232. But no group can demand for itself what it would deny to others. Otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, the Mandate attacks the freedom of employers who hold conscientious objections to contraception and/or abortion. The rights of women to access reproductive services do not trump the rights of all others.

This Court needs to preserve the constitutional liberties guaranteed to *all* citizens. Americans who want to expand their own civil rights must grant equal respect to opponents, rather than crushing them with debilitating legal penalties:

> The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

United States v. Ballard, 322 U.S. 78, 95 (1944).

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." ...

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245.

This principle cuts across all viewpoints and constitutional rights, including speech, press, association, and religion. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Boy Scouts of America v. Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). Justice

Black said it well in co nnection with the Comm unist Party, which advocated som e of the m ost dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedom s of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to th e ideas we hate or sooner or late r they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James , 408 U.S. 169, 187-188 (1972). *Healy* is about association rights—not reproductive rights. But a decisi on upholding the Mandate will ulti mately not advance the cause of any group seeking enhanced constitu tional protection. On the contrary, th e liberty of all Americans will suffer irreparable harm if an alleged r ight to *funding* of reproductive rights is allowed to stifle basic right s of religion and conscience. Moreover, non-discrim ination principles should never be applied in a discri minatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should grant Plaintiffs' Motion for Preliminary Injunction.

Respectf ully submitted,

/s/ Deborah J. Dewart
Deborah J. Dewart (*pro hac vice* motion pending)

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