APPEAL NO. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,

PLAINTIFFS-APPELLANTS,

v.

JACOB J. LEW, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; SETH D. HARRIS, Acting Secretary of the United States Department of Labor in his official capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity,

DEFENDANTS-APPELLEES.

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

SUPPLEMENTAL REPLY BRIEF ON REMAND OF APPELLANTS LIBERTY UNIVERSITY, MICHELE G. WADDELL AND JOANNE V. MERRILL

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INTRODUCTION

The Supreme Court's opinion in *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012), establishes that this Court has jurisdiction to hear this case and that the employer insurance mandate ("employer mandate") exceeds Congress' enumerated powers. Under *NFIB* the individual insurance mandate ("individual mandate") is constitutional as a tax, but it is an unconstitutional infringement of Plaintiffs' rights under the First Amendment and the Religious Freedom Restoration Act (RFRA). The Administration's implementation of the employer mandate also violates the First Amendment and RFRA. The mandates also violate Equal Protection and the Establishment Clause.

LEGAL ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS.

The Anti-Injunction Act, 26 U.S.C. §7421 (AIA), does not apply to the individual mandate even though the *NFIB* Court found the payment for failing to acquire health insurance was a tax. *NFIB v. Sebelius*, 132 S.Ct. 2566, 2594 (2012). Applying the Supreme Court's analysis (which is similar to the analysis the Administration applied to previously reach the same conclusion in this case) to the employer mandate yields the same conclusion.[1] The imminent full implementation of the employer and individual mandates strengthens Plaintiffs' standing to challenge them.

[1] *See* Supplemental Brief for Appellees, Dkt. #96, pp. 3-7.

A. The AIA Does Not Apply To The Employer Mandate.

As the Administration has argued in this Court, the Supreme Court and other appellate courts, the AIA does not apply to challenges to the insurance mandates. The Administration now contradicts its own arguments to claim that the AIA should be applied to the employer mandate, but its prior reasoning in this case regarding the AIA, adopted by the Supreme Court in *NFIB*, establishes otherwise.

As the Administration said in its Supplemental Brief, "the AIA bars a suit to restrain assessment or collection of a 'penalty' established in Subchapter B of chapter 68 . . . because such penalties are deemed taxes for purposes of all of Title 26." (Dkt. #96, p.3). The Administration noted that the individual mandate penalty, 26 U.S.C. §5000A, appears in Chapter 48, not Chapter 68, of the Internal Revenue Code; it is not among the "penalties" that come within the ambit of the AIA. Similarly, the employer mandate, 26 U.S.C. §4980H, appears in Chapter 43, not in Chapter 68; it, too, is not among the "penalties" that are governed by the AIA.

The Administration explained that since the individual mandate is "integral" to other critical provisions in the Act, including guaranteed-issue and community-rating, Congress would not have wanted to wait until after these interconnected provisions were implemented and relied upon to resolve constitutional challenges. (Dkt.# 96, pp. 6-7). "Congress delayed the effective date of the minimum coverage provision, thus dramatically mitigating the risk of disruption to ongoing

administration of the tax code that the AIA is intended to prevent." (*Id.* at p. 7). The same is true of the employer mandate, *i.e.*, that it is integral to the Act so that Congress would not want to delay constitutional review, and its effective date was delayed so as to mitigate disruption. Under the Administration's own analysis, the AIA does not apply to the employer mandate.

In its briefing to the Supreme Court in *NFIB*, the Administration explained that other provisions in the Act[2] specifically made the AIA applicable while Section 5000A did not.[3] The Administration argued that Congress' failure to make the AIA applicable to Section 5000A militated in favor of finding that it did not apply.[4] Applying the Administration's own argument to the employer mandate leads to the conclusion that the AIA does not apply.

In a case challenging the regulations implementing the insurance mandates to include coverage of contraceptives as preventive care ("preventive care mandate"), the Administration reiterated that the AIA does not bar challenges to the insurance mandates or the regulations. "In most circumstances, the Anti-Injunction Act ("AIA"), 26 U.S.C. §7421(a), would deprive the court of

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[2] Plaintiffs will use "the Act" to describe the Patient Protection and Affordable Care Act of 2009.

[3] Brief of Petitioners (Anti-Injunction Act) at 25, *United States Dep't. of Health and Human Services v. State of Florida* (No. 11-398), *decided sub. nom. National Federation of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

[4] *Id.*

jurisdiction to hear the suit. The AIA, however, does not apply here because of the unique statutory structure of 42 U.S.C. §300gg-13(a)."[5]

These repeated admissions that the AIA does not apply outside a few narrow provisions not relevant here are a judicial admission which prevents the Administration from reversing itself. *See, e.g., Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 265 (4th Cir. 2004) ("When a party unqualifiedly waives a legal defense, it is within the court's discretion to construe that waiver as judicial admission in a manner that effectuates the strategic purpose for which the court reasonably believes the waiver was made."); *Lucas v. Burnley*, 879 F.2d 1240, 1242 (4th Cir. 1989) ("The general rule is that 'a party is bound by the admissions of his pleadings.'") (citations omitted). The force of the logic compels the conclusion that the AIA does not foreclose Plaintiffs' claims.

The Administration wrongly asserts that the use of the word "tax" in a few places in 26 U.S.C. §4980H justifies application of the AIA. In *NFIB*, the Court said:

> Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other.... The Anti–Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the

[5] Supplemental Brief of Appellees at 3, *Autocam Corporation v. Sebelius*, No. 1:12-cv-01096-RJJ (W. D. Mich Dec. 21, 2012).

> statutory text. We have thus applied the Anti–Injunction Act to statutorily described 'taxes' even where that label was inaccurate.

132 S.Ct. at 2583. The *NFIB* analysis and the Administration's prior reasoning against the application of the AIA control here. The AIA does not apply.

B. The Administration's Standing Argument Is Meritless.

The effects of the employer and individual mandates that the district court found sufficiently certain and impending to confer standing in 2010 (JA 00153-00158) are even more certain and impending in 2013. Liberty University will feel the full brunt of the employer mandate less than 90 days after oral argument, as the one-year safe harbor postponing the regulations requiring that employers provide free "contraceptives," including abortifacients, under the preventive care mandate will expire on July 31, 2013. In its brief to this Court on this same case, the Administration wrote: "The government does not challenge the district court's threshold determinations on standing, ripeness, and the applicability of the Anti-Injunction Act." (Dkt #34, p. 5, n. 1). Nevertheless, the Administration now claims Plaintiffs do not have standing. This argument lacks merit.

1. Plaintiffs Have Standing To Challenge the Employer Mandate.

In 2010, the district court said that "the harm faced by Plaintiffs is not remote or ill-defined—in 2014, the provisions, which are already signed into law, will trigger the statutory requirement to purchase health insurance, and that

obligation is weighty enough to require costly and advance financial preparation." (JA 00156). Noting that "imminence" is a somewhat "elastic" concept, the district court found that Plaintiffs met the threshold of a "certainly impending" injury sufficiently to assert Article III standing to challenge the employer mandate. (JA 00153, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). Plaintiffs' claims were "certainly impending" in 2010, and are even more so in 2013.

The Administration argues that Plaintiffs lack standing, raising the same arguments that were rejected in 2010, but it does not provide any legal basis for reconsidering standing. The Administration cites *Clapper v. Amnesty International, USA*, 133 S.Ct. 1138, 1150 (2013), but that case merely re-iterated the principles set forth in *Lujan* and other cases relied upon by the district court.

The Administration also does not provides a factual basis for revisiting standing, unlike the defendants in *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 516, 520 (4th Cir. 2003). Even there, this Court found that the facts did not justify reviewing standing. *Id.* Here, the facts occurring since the district court's ruling strengthen the certainty as well as the impendency of Plaintiffs' injuries. The Administration has determined that employers must include free "contraceptives," including abortion-inducing drugs and IUDs, as part of their mandated employee health insurance. 77 Fed. Reg. 8,725, 8,728 (February 15,

2012). Providing those drugs will infringe upon the religious beliefs of Liberty University and place it in the position of having to choose between its religious convictions and complying with the law. This makes Plaintiffs' allegations that the employer mandate violates religious liberty even more of a certainty now than they were in 2010.

Liberty University has standing because effective January 1, 2014, it must provide health insurance according to the Act's "minimum essential coverage" requirements or pay a penalty of $2,000 per employee per year. If the University provides coverage, it is certain it will not meet the "essential coverage" because it will not provide the "preventive coverage mandate." Liberty will therefore be fined $2,000 per employee per year. The safe harbor regulation expires less than 90 days after oral argument, at which time Liberty's religious free exercise will conflict with the Act. Also, if Liberty provides coverage but any one of its "full-time equivalent" employees meets the 9.5 percent threshold of costs to household income, the University will be fined $3,000 for each violation. These injuries are not speculative. They are certain and immediate. Standing is even more certain at this juncture than it was in 2010 and there is no justification for revisiting the issue.

2. Plaintiffs Have Standing to Challenge the Individual Mandate.

The Administration offers no new argument to justify revisiting the issue of standing regarding the individual Plaintiffs. The district court already determined that the allegations of the Complaint were "certainly impending" in 2010 and since *Clapper* did not change the standard for "certainly impending" injury, there is no basis to review the standing question as to these Plaintiffs.

When the Act is fully implemented on January 1, 2014, the Individual Plaintiffs must obtain health insurance or pay a penalty. They cannot obtain the government-defined health insurance because their religious convictions prevent them from directly or indirectly funding surgical or chemical abortions. Whenever they need or want insurance, they will have no ability to avoid a plan that covers abortion because every plan, including employer provided coverage and exchanges, will cover chemical abortion under the "preventive care" mandate. Plaintiffs will be forced to subsidize abortion. Even worse, individuals who are part of a plan that covers abortion must pay $1.00 per month into a fund designed solely to fund abortion. Plaintiffs' injury was certain in 2010 and is even more certain now. This Court should reject the invitation to reconsider standing.

II. THE EMPLOYER MANDATE EXCEEDS CONGRESS' ENUMERATED POWERS.

Congress' enumerated powers must be read carefully "to avoid creating a general federal authority akin to the police power." *NFIB v. Sebelius*, 132 S.Ct. 2566, 2578 (2012). The Court found the individual mandate exceeded Congress' authority under the Commerce and Necessary and Proper Clauses. This Court should find the same regarding the employer mandate. *Id.* at 2593.

Significant differences between the penalties assessed in the individual and employer mandates means that, under *NFIB*'s Taxing and Spending Clause analysis, the employer mandate is "so punitive that the taxing power does not authorize it." *See id.* at 2600.

A. The Employer Mandate Exceeds Congress' Taxing Power.

1. NFIB's Differential Analysis Of An Impermissible Penalty And A Permissible Tax Establishes That The Employer Mandate Is An Impermissible Penalty.

Applying *NFIB's* analysis of *Bailey v. Drexel Furniture Co*., 259 U.S. 20, 36–37 (1922) to the employer mandate establishes that it is an impermissible penalty. *See NFIB*, 132 S.Ct. at 2595-2596. In *Drexel Furniture*, the Supreme Court focused upon three characteristics of the challenged exaction to conclude that it was an impermissible penalty—*i.e.*, it imposed an exceedingly heavy burden regardless of the *de minimis* nature of the offense, it imposed that exaction on those who knowingly employed underage laborers, and it was enforced by the Department of Labor along with the Internal Revenue Service. *NFIB*, 132 S.Ct. at

2595 (citing *Drexel Furniture*, 259 U.S. at 36–37). *NFIB* found that those attributes were not present in the individual mandate, so it could be characterized as a permissible tax. *Id.* at 2596.

The employer mandate, unlike the individual mandate, does impose a heavy burden upon employers. The Administration haggles over whether the $3,000 penalty for providing coverage that is not "affordable" is calculated based on the number of employees who seek a subsidy versus the total number of employees, but does not and cannot dispute that employers will face a penalty of $2,000 per employee per year for not providing any coverage or for providing coverage that does not meet the "essential benefits" requirement, which includes the preventive care mandate. 26 U.S.C. §4980H(a).

An individual can either obtain acceptable coverage or pay the tax and comply with the mandate. The Supreme Court observed that the amount of the tax penalty under the individual mandate is minimal compared to the amount for the annual premium. *NFIB*, 132 S.Ct. at 2596. But that is not the case with employers. If Liberty University does not provide insurance coverage, it will be fined $2,000 per employee per year, resulting in millions of dollars of penalties. Even if Liberty provides insurance, but refuses to provide any portion of the preventive care mandate (including abortifacients and IUDs), it will still be penalized $2,000 per year for every one of its "full time equivalent" employees.

In that case, Liberty will pay millions of dollars for insurance *and* pay millions of dollars in penalties for refusing to provide abortifacients. 26 U.S.C. §4980H(a). With regard to the $3,000 fine, regardless of whether it applies only to the number of employees seeking a federal subsidy or to all employees, it too imposes a penalty even when an employer provides health insurance, potentially resulting in millions of dollars of fines on top of insurance payouts. 26 U.S.C. §4980H(b). As was true with the exaction in *Drexel Furniture* and untrue with regard to Section 5000A, the payment under Section 4980H imposes a heavy financial burden upon employers as punishment for not complying with government definitions of essential health care and affordability.

Liberty University cannot, as a matter of religious conviction, provide any coverage, direct or indirect, for abortion-inducing drugs or IUDs. This refusal will result in millions of dollars in fines annually. The Act coerces Liberty to violate its religious convictions under penalty of enormous fines. These excessive fines constitute an impermissible penalty under *Drexel Furniture.*

Also, as was true in *Drexel Furniture* and untrue as to Section 5000A, the penalties for failure to comply with the employer mandate are not only enforced by the Internal Revenue Service, but also by the Department of Labor. The requirements for essential health benefits, including preventive services for women, were incorporated by reference into the Employee Retirement Income

Security Act (ERISA) and therefore became part of the requirements for employee benefit plans. 29 U.S.C. §1185d. The Department of Labor enforces ERISA and is empowered to seek "appropriate relief" when an employer violates its provisions. 29 U.S.C. §1132(a)(5). Therefore, an employer which fails to provide "affordable" health insurance offering "essential health benefits" will be subject not only to an IRS penalty, but also to penalties and punishment by the Department of Labor.

Like the provision in *Drexel Furniture*, the employer mandate represents an impermissible penalty, not a permissible tax. *Drexel Furniture*, 259 U.S. at 36–37. It exceeds Congress' enumerated powers under the Taxing and Spending Clause.

2. The Employer Mandate Cannot be Contorted to Fit Within Congress' Taxing Power.[6]

The Administration's argument that Section 4980H should be treated as a tax because it sometimes uses the word "tax" is unfounded and misrepresents *NFIB*. Section 5000A refers to the payment for failure to acquire insurance as a "penalty." 26 U.S.C. §5000A(b)(1). Section 4980H labels the fee assessed upon employers for either not providing health insurance or for providing insurance that lacks "essential" benefits or is not "affordable" an "assessable payment." 26 U.S.C. §§4980H(a), (b). With the exception of two subsections that use the word "tax,"

[6] As Amicus Landmark Legal Foundation explains, the mandate cannot be validated under any of the taxing provisions in the Constitution. *Brief of Amicus Curiae Landmark Legal Foundation* (Dkt # 125-1).

Section 4980H consistently uses the word "assessable payment" to describe the penalties assessed against employers. 26 U.S.C. §4980H. The word "tax" appears more frequently overall in Section 4980H than in Section 5000A because Section 4980H refers to the premium tax credit available to employees, which is not part of Section 5000A. 26 U.S.C. §4980H.

NFIB established that the terminology is not determinative of whether an exaction is a tax or penalty. *NFIB*, 132 S.Ct. at 2594. "Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other." *Id*. The label it is not determinative for purposes of whether an exaction is constitutional under the Taxing and Spending Clause. *Id.* "We thus ask whether the shared responsibility payment falls within Congress's taxing power, '[d]isregarding the designation of the exaction, and viewing its substance and application.'" *Id.* (citing *United States v. Constantine*, 296 U.S. 287, 294 (1935)). "In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson v. Sears, Roebuck & Co*., 312 U.S. 359, 363 (1941).

In *Drexel Furniture*, that analysis of the exaction's practical operation meant that what was labeled a "tax" was actually a "penalty." 259 U.S. at 36–37. In this

case, the practical operation of the exaction under Section 4980H similarly means that, regardless whether it is labeled a "tax" or a "penalty," it operates as a penalty.

The employer mandate cannot be upheld as a permissible tax as applied to non-profit organizations such as Liberty University, which is designated as a tax-exempt organization under 26 U.S.C. §501(c)(3). Nowhere does the Act indicate Congressional intent to amend the non-profit tax code. Nothing in the tax code permits a non-profit to be taxed for failure to provide "essential" or "affordable" health insurance. The Administration does not even attempt to rebut this argument. Liberty University is tax-exempt. Any payment for failure to comply with any portion of the employer mandate cannot be a tax. It can only be an "assessable payment," *i.e.*, a penalty. Liberty University is not subject to taxation, and there is no indication that Congress intended to alter the tax status of non-profit organizations. The mandate cannot be upheld under the Taxing and Spending Clause.

B. The Employer Mandate Exceeds Congress' Commerce Clause Powers.

NFIB's declaration that Congress "does not have the power to order people to buy health insurance" applies equally to employers. *NFIB*, 132 S.Ct. at 2601. Just as Congress has no authority under the Commerce Clause to force individuals "to purchase an unwanted product," *id.* at 2586, so Congress lacks authority to

force employers to purchase an unwanted product under the guise of regulating "the terms and conditions of employment." None of the statutes regulating employers' voluntary participation in employee benefit programs supports the Administration's argument to the contrary.

"In contrast to the obligatory, nationwide Social Security program, '[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.'" *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). Employers must comply with ERISA and similar regulations if they voluntarily provide employee benefits, but not if they do not provide such benefits. *Id.* Under ERISA, employers may discontinue providing the benefits without penalty. That is not the case with Section 4980H, which requires that employers either provide the government-defined coverage at a cost that the government determines is "affordable" or else pay substantial penalties. Not only are employers prohibited from opting out of the coverage to avoid the regulation, but they are also subject to substantial penalties even if they comply with the insurance mandate and the government determines that the insurance does not meet "essential" coverage or is not "affordable."

The employer mandate is also unlike the anti-discrimination statutes cited by the Administration. Title VII of the Civil Rights Act of 1964, the Americans with

Disabilities Act, and the Age Discrimination in Employment Act impose liability if an employer engages in conduct that discriminates against a protected class of people. 42 U.S.C. §2000e-2; 42 U.S.C. §12112; 29 U.S.C. §623. They do not, as the employer mandate does, compel employers to engage in particular conduct or purchase an unwanted product. In order for the anti-discrimination laws to be analogous to the employer mandate, they would have to compel employers to hire a certain number of members of the protected classes, *i.e.*, impose quotas—something that is prohibited except when ordered by a court as a remedial measure in very limited situations reflecting egregious discrimination. *Regents of the University of California v. Bakke*, 438 U.S. 265, 345-346 (1978); *Sledge v. J.P. Stevens & Co., Inc.*, 585 F.2d 625, 646-647 (4th Cir. 1978). Imposing liability for past misconduct is not analogous to compelling the purchase of a government-defined employee benefit.

None of the precedents or statutes cited by the Administration supports the employer mandate. Such a mandate "would open a new and potentially vast domain to congressional authority" under the Commerce Clause. *NFIB*, 132 S.Ct. at 2587. Congress cannot be permitted to "reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'" *Id.* (citing THE FEDERALIST No. 48, at 309 (James

Madison)). That is precisely what Congress did when it enacted the employer mandate, and this Court should halt this unprecedented regulation.

III. THE MANDATES' INFRINGEMENT OF PLAINTIFFS' RELIGIOUS LIBERTIES IS MORE PALPABLE THAN EVER IN LIGHT OF THE ADMINISTRATION'S IMPLEMENTING REGULATIONS.

This Court asked the parties to address developments which occurred since the initial briefing. (Dkt. #114). Responding to that request necessarily means that the parties will address issues which were not fully analyzed in the initial briefing because they had not yet occurred. Two post-briefing developments are most relevant to Plaintiffs' challenges, *i.e.,* the decision in *NFIB v. Sebelius*,132 S.Ct. 2566 (2012), and the Administration's adoption of regulations defining the preventive care mandate.

A. The Preventive Care Mandate Is Rightly Before This Court.

At the time that Plaintiffs filed this action (on the day the Act became law), the Act provided that employers with 50 or more full-time employees offer health insurance which qualified as "minimum essential coverage" at an "affordable" cost or face penalties of $2,000 or $3,000 per employee per year. 26 U.S.C. §4980H. Defining "minimum essential coverage" requires a circuitous trip through various sections of the Act, all of which were enacted at the time that Plaintiffs filed this action. Section 1301 of the Act states that health insurance plans must provide "the essential health benefits package" described in Section 1302 of the Act. 42 U.S.C.

§18021(a)(1)(B).[7] Section 1302, codified at 42 U.S.C. §18022(a), provides in pertinent part that "essential health benefits" are to be defined by the HHS Secretary, but shall include at least preventive and wellness services partially defined in 42 U.S.C. §300gg-13 and subject to further definition through comprehensive guidelines to be developed by the Health Resources and Services Administration. 42 U.S.C. §18022(a); 42 U.S.C. §300gg-13. Those guidelines provide that all FDA-approved "contraceptives," which include abortion-inducing drugs, are to be provided free of charge as part of the "preventive care mandate." 76 Fed. Reg. 46,621(August 3, 2011). The Congressional Research Service explained the connection between the "preventive care mandate" adopted as part of Section 300gg-13 and the employer mandate:

> Section 2713 of the Public Health Service Act (PHSA), as added by ACA and incorporated under section 715(a)(1) of the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) of the Internal Revenue Code (IRC), requires group health plans and health insurance issuers that offer group or individual health insurance coverage to provide coverage for certain preventive health services without imposing any cost sharing requirements. Section 2713(a)(4) indicates that such services will include "with respect to women, such additional preventive care and screenings...as provided for in

[7] Section 1302 of the Act has been part of Plaintiffs' challenges from the outset. *See* Second Amended Complaint, Paragraphs 43-47. (JA 0022-0023).

> comprehensive guidelines supported by the Health Resources and Services Administration.... " 42 U.S.C. §300gg-13(a)(4).[8]

The "preventive care mandate" is a post-briefing development that clarifies what Liberty University will have to provide in order to comply with the employer mandate. As such, it is part and parcel of Plaintiffs' challenge and relevant to this Court's analysis.

Nevertheless, the Administration claims that the issue is not before the Court because Section 300gg-13 is somehow wholly "independent" from Section 4980H. Ignoring the interdependence between Section 4980H's general description of "minimum essential coverage" and the specific definition of what that coverage must include under Section 300gg-13, the Administration wrongly alleges that the regulations published to complete the definition of essential benefits required for employee health plans "do not implement" Section 4980H. (*Id.*). Section 300gg and its implementing regulations define the insurance coverage that must be provided under Section 4980H, and therefore, is "at issue" before this Court as one of the post-briefing developments that affects Plaintiffs' constitutional claims. The effect is substantial, in that the regulations put in sharp focus what Plaintiffs alleged would occur under the mandates, *i.e.*, that Plaintiffs will be forced to

[8] Cynthia Brougher, *Preventive Health Services Regulations: Religious Institutions' Objections to Contraceptive Coverage*, CONGRESSIONAL RESEARCH SERVICE (February 22, 2012) at 2.

choose between violating their religious beliefs and obeying the law, or adhering to their beliefs and violating the Act, as discussed in detail in Plaintiffs' Supplemental Opening Brief at pp. 38-43.

B. The Imminent Expiration Of The Administration's "Safe Harbor" And Absence Of An Exemption For Plaintiffs Make These Claims Ripe For Review.

Liberty University faces an imminent threat to its religious liberty as the "safe harbor" provision expires on July 31, 2013. 77 Fed. Reg. at 8,728. As of August 1, Liberty University will have to provide health insurance that includes "contraceptives," including abortion-inducing drugs and IUDs. *Id.* Only churches, integrated auxiliaries, conventions or associations of churches or religious orders are exempt. 78 Fed. Reg. 8,456, 8,474 (February 6, 2013).

Despite representations from the Administration that it would use the one-year "safe harbor" postponement to craft regulations that would address religious objections of non-church employers, 77 Fed. Reg. at 8,728, the new proposed rulemaking has not broadened the exemption to protect non-church organizations. 78 Fed. Reg. at 8,474. Liberty University will have to provide the abortion-inducing drugs to its employees directly or through a third party agent that will provide these chemical abortions "free." *Id.* While the proposed rulemaking asserts that the insurer will not charge the employer "directly or indirectly" for the coverage, it also does not explain how the cost of the drugs will be paid. *Id.* The

proposal references potential reductions in fees paid for participating in health insurance exchanges (for insurance companies, which is irrelevant for a self-insured), but otherwise leaves unanswered how a self-insured organization like Liberty University will not pay directly or indirectly for abortifacients and IUDs. *Id.* at 8,463-8,465. The Administration has not remedied the violation of Plaintiffs' religious beliefs presented by the "preventive care mandate." In less than 90 days, Liberty University will face the Hobson's choice of staying true to its religious beliefs or complying with the law.

The "preventive care mandate" leaves no choice to Liberty University or the individual Plaintiffs. 78 Fed. Reg. at 8,474. Plaintiffs cannot avoid financial penalties unless they provide or acquire insurance that includes abortion-inducing drugs. *Id.* There is no option to choose a policy without that coverage, or to opt out of the contraceptive coverage. *Id.* Those who do not have policies providing free contraceptive coverage will be deemed to not have qualified health plans and will be subject to substantial fines. 26 U.S.C. §§4980H, 5000A.

Ignoring the imminent expiration of the "safe harbor" and actual contents of the proposed rulemaking, the Administration argues the controversy is not ripe because Plaintiffs have the protection of the safe harbor and the rulemaking will

address Plaintiffs' religious liberty claims.[9] Neither argument is true. As of August 1, Liberty University will no longer have the protection of the "safe harbor." It will have to provide health insurance that includes all of the government defined "essential health benefits," including the preventive care mandate or be subject to the $2,000 per employee per year penalty. 77 Fed. Reg. at 8,728. Also, contrary to the representations made when the safe harbor was instituted, the final proposed regulations will not permit non-church non-profit faith-based employers to avoid facilitating the provision of abortifacient drugs and devices to their employees. 78 Fed. Reg. at 8,474. As President Obama indicated when the "safe harbor" was first announced, "women will have free preventive care that includes contraceptive services no matter where she works."[10] The proposed rulemaking does not address the religious infringement that the preventive mandate places upon non-church non-profit faith-based employers. Instead, it proposes an "accommodation" that is nothing more than an elaborate shell game which purports to shield employers

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[9] The Administration's reference to *Wheaton College v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012), does not support their argument. The *Wheaton College* decision was made before the proposed rulemaking, and the court held the case in abeyance based upon the Administration's representations that the proposed rulemaking would resolve the employer's religious objections. *Id.* at 553.

[10] White House FACT SHEET: Women's Preventive Services and Religious Institutions (February 10, 2012), available at http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions (last visited April 22, 2013).

from having to directly pay for the contraceptives by requiring third party insurers to provide "free" contraceptives, but fails to address how self-insureds will avoid payment for the preventative care.

Since the proposed rulemaking does not address Plaintiffs' religious liberty claims and the safe harbor is expiring, Plaintiffs' claims are ripe for review.

C. The Insurance Mandates Burden Plaintiffs' Religious Exercise.

Congress provided, and the Administration initially promised, that no health plan would be required to include "abortion" as an essential health benefit. 42 U.S.C. §18023(b)(1); Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (March 24, 2010). However, as Plaintiffs alleged in their Complaint and has been proven true with the Administration's implementation of the Act, the insurance mandates fail to protect the religious rights of Plaintiffs against facilitating abortion and other procedures that violate their sincerely held religious beliefs. The regulations implemented by the Administration solidify Plaintiffs' allegations that the insurance mandates compel participation in chemical abortions as well as establishing an "abortion premium mandate" for certain health insurance plans.[11] These are just the type of facts pointing to a substantial burden that Judge Davis indicated would be persuasive in convincing the Court to review Plaintiffs'

[11] Amici Members of Legatus explain in detail how the Act implements an abortion premium mandate on those who purchase health insurance. (Dkt. #128-1).

religious liberty claims. *Liberty University v. Geithner*, 671 F.3d 391, 451 (4th Cir. 2011) (Davis, J., dissenting).

Plaintiffs' claims are wholly unlike the claims addressed by the Sixth Circuit in *U.S. Citizens Ass'n v. Sebelius,*705 F.3d 588, 597-603 (6th Cir. 2013), relied upon by the Administration. In *U.S. Citizens*, plaintiffs alleged that the individual mandate violated their rights of association and privacy by mandating that they contract with and provide private information to an insurance company. *Id.* at 598, 602. The Sixth Circuit upheld the dismissal of their claims, finding that the rights asserted "cannot be characterized as 'fundamental' so as to receive heightened protection under the Due Process Clause." *Id.* at 601.

That is not the case here, where the insurance mandates threaten Plaintiffs' sincerely held religious beliefs, an interest of the "highest order" which must be analyzed utilizing strict scrutiny, which the Administration cannot satisfy. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641-642 (1943). The Administration cannot establish that the insurance mandates, including the preventive care mandate, are justified by compelling state interests and are narrowly tailored to advance those interests. *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). The Administration has determined that certain "religious employers," as well as those who employ fewer than 50 people, do not need to comply with the preventive care mandate, which undermines its claim that

providing free contraception, sterilization, and abortifacients is necessary to protect women's health. [12] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Similarly, the Administration's determination that members of certain religious sects and those belonging to health care sharing ministries do not have to comply with the individual mandate and, particularly the preventive care mandate, undermines any claim that the individual mandate is narrowly tailored to meet a purported compelling governmental interest in providing contraception as preventive care. *Id.* In fact, the Administration does not even address the compelling state interest or narrow tailoring factors in its Supplemental Response, thereby implicitly admitting that it cannot meet the strictures of strict scrutiny. That being the case, the Administration cannot contend that there is no infringement of Plaintiffs' free exercise rights.

Since its inception the Act has sanctioned differential treatment of religious adherents based upon subjective determination of whether the adherents' beliefs

[12] This is particularly true in light of the evidence that the contraceptives that the Administration requires to be part of "preventive care" for women are themselves harmful, even carcinogenic. *See Amicus Brief of Members of Legatus* (Dkt. #128-1); *Amicus Brief of Breast Cancer Prevention and Life Legal Foundation* (Dkt #124-1). This undercuts the Administration's claim that the preventive care mandate is necessary to further the government's compelling interest in protecting women's health, regardless of the scientific dispute regarding whether certain contraceptives are abortifacients. *See Brief for Amici American College of Obstetricians and Gynecologists, et. al.* (Dkt. # 180-1).

are sincere enough to warrant protection.[13] *See* 26 U.S.C. §5000A (d)(2). Implementation of the insurance mandates requiring that abortifacients be provided as "preventive care" has exacerbated the problem by creating further classifications of religious adherents that assign levels of protection based upon whether the adherent is a "church," non-profit non-church organization or a for-profit organization. 78 Fed. Reg. at 8,474. Only churches are deemed "religious enough" to be exempt from the preventive care mandate. *Id.* Non-church non-profit organizations might be determined to be "religious enough" only to avoid directly paying for the abortifacient coverage. *Id.* Religious adherents who run for-profit organizations cannot be "religious enough" to warrant any protection from directly paying for abortifacient drugs. *Id.* at 8,462. These exemptions are textbook examples of the kind of unequal treatment that the Supreme Court has consistently determined violates religious freedom. *Lukumi*, 508 U.S. at 542; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). The Administration has violated the "fixed star in our constitutional constellation" that no governmental official can determine what is orthodox in religion and compel citizens to comply with its determination. *Barnette*, 319 U.S. at 642.

[13] Amici Alliance Defending Freedom, Americans United for Life, et al. (Dkt. #145-1), Project Liberty (Dkt. #126-1) and American Civil Rights Union (Dkt. #122-1) provide detailed analyses of how the Act violates religious exercise under both the First Amendment and RFRA.

The *Lukumi* Court held that granting preferential status to some religious adherents, as is the case with the exemptions under Section 5000A and the preventive care exemption for churches, "accommodation" for non-church non-profits and non-protection for for-profit faith-based employers, violates the fundamental tenet that government is not to exhibit covert hostility against religion through unequal treatment of certain religious groups. 508 U.S. at 531. Categories of selection are of "paramount concern when a law has the incidental effect of burdening religious practice," as does the mandate to purchase insurance with coverage for abortifacients. *Id.* Here, certain religious adherents will not face the Hobson's choice of either violating their religious beliefs by purchasing coverage for abortifacients or incurring financial penalties for adhering to their religious beliefs if they can meet the government's definition of a "church" or "church-related auxiliary," or governmental definitions of preferred sects or "healthcare sharing ministries," while others such as Plaintiffs will face that choice because they do not belong to the preferred religious organizations. Since this is the type of "masked" governmental hostility that the *Lukumi* Court condemned, this Court should "survey meticulously" the circumstances of the governmental categories and eliminate the "religious gerrymanders" inherent in the mandates. *Id.* at 534.

As well as infringing upon Plaintiffs' rights to free expression under the First Amendment, the insurance mandates also violate the statutory protections

provided under RFRA. The Act mandates that, under force of penalty, Plaintiffs must violate their religious beliefs and obey the law or adhere to their beliefs and violate the Act. 42 U.S.C. §§ 300gg, 18022; 45 CFR § 147.130. This places an impermissible burden upon religious exercise that cannot be countenanced unless the Administration can meet the higher compelling interest standard instituted under RFRA. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 438 (2006). Under that standard, the Administration must demonstrate it has a compelling interest and that such interest be applied to the *particular party* whose sincere exercise of religion is being substantially burdened. *Id.* at 430-31 (citing 42 U.S.C. § 2000bb-1(b)). The Administration must demonstrate that granting a religious exemption to *these Plaintiffs* will seriously compromise its ability to administer the Act, including the preventive care mandate. *See id.* at 435. The substantial exemptions the Administration has already granted for the mandates in general and preventive care mandate in particular establish that it cannot meet this high standard. *Lukumi*, 508 U.S. at 547. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.*

The Administration has not and cannot satisfy strict scrutiny standards and therefore cannot justify the substantial burdens it has placed upon the Plaintiffs' sincerely held religious beliefs. The Administration does not respond to this

argument and therefore concedes it lacks a compelling interest. Nor does the Administration present any argument that the preventative care mandate is the least restrictive means available. The insurance mandates violate Plaintiffs' rights under the First Amendment Free Exercise clause and RFRA.

IV. THE MANDATES' DIFFERENTIAL TREATMENT OF RELIGIOUS ADHERENTS VIOLATES THE ESTABLISHMENT AND EQUAL PROTECTION CLAUSES.

The Act and implementing regulations create religiously based distinctions within the individual and employer mandates that violate Equal Protection and the Establishment Clause. Plaintiffs' sincerely held religious beliefs are infringed by the mandates to purchase or provide health insurance that includes surgical or chemical abortion or pay penalties. Their beliefs are not protected under either the exemptions in Section 5000A or the regulatory exemptions because their beliefs do not conform to certain prerequisites. The identical beliefs of other religious adherents are accorded protection because they belong to the "right" religious sect or are defined as or affiliated with a church. Similarly situated people and employers are not treated similarly in violation of the Equal Protection Clause. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The mandates also violate the central purpose of the Establishment Clause, *i.e.*, "ensuring governmental neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971).

V. PLAINTIFFS' ORIGINATION CLAUSE AND SEVERANCE ARGUMENTS ARE PROPERLY BEFORE THE COURT.

This Court asked the parties to address, in light of the Supreme Court's determination that the individual mandate penalty is a permissible tax, whether the employer mandate exceeds Congress' enumerated powers, and to address post-briefing developments. Plaintiffs' Origination Clause and severance arguments arise from the Court's decision.

Prior to *NFIB*, 132 S.Ct. 2566 (2012), neither Congress nor any court had labeled the Act's insurance mandates as "taxes." Once that label was applied by *NFIB*, the question of whether Congress had complied with the constitutional prerequisites for a taxing measure, including the Origination Clause, became relevant. That post-briefing development falls squarely within this Court's directions upon remand from the Supreme Court. As discussed more fully in Plaintiffs' Supplemental Opening Brief (pp. 33-36) and the Brief by Amicus Curiae Foundation for Moral Law (Dkt. #140-3), if classified as a tax, the mandates violate the Origination Clause. That being the case, the entire Act should be declared invalid.

Should this Court find that the employer mandate is unconstitutional, the issue of severability will be relevant, because this Court would have to determine whether the remainder of the Act can survive absent the mandates. *Alaska Airlines*

v. Brock, 480 U.S. 678, 685 (1987). As Plaintiffs stated in their Supplemental Opening Brief (pp. 60-61) and as Amicus Curiae Family Research Council demonstrates (Dkt. #123-1), this Court should find that the mandates are not severable and declare the entire Act invalid.

CONCLUSION

The AIA does not bar Plaintiffs' challenges to the employer mandate and Plaintiffs have standing. The employer mandate is not a valid exercise of Congress' enumerated powers. The Act and its implementation of the mandates violate RFRA, the Free Exercise, Equal Protection, and Establishment clauses.

Based upon the foregoing, this Court should declare that the mandates are unconstitutional, and since they are not severable, that the entire Act is unconstitutional.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2010.

2. Exclusive of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; addendum of statutes and the certificate of service, the brief contains 6,995 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

April 24, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2013, I served the Supplemental Reply Brief on Remand on all parties or their counsel of record through the CM/ECF system.

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