No. 12-831

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2012

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

WESTMINSTER SOCIAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Greg Skidmore
Bethany Rupert
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaenous Authorities

Regulations

Constitutional Provisions

QUESTIONS PRESENTED

The United States Department of Health and Human Service mandate ("HHS mandate"), made effective on May 1, 2012, requires all employers to include pregnancy prevention services in their employee health insurance plans. Although the HHS mandate allows some religious employers to be exempted from its requirements, it does not allow all religious employers the same exemption.

1. Does the HHS mandate, as applied to Westminster Social Services, Inc. ("Westminster"), violate the Free Exercise Clause or Establishment Clause of the First Amendment, when it exempts numerous employers, including some religious employers, from its requirements, but does not exempt Westminster?
2. Does the HHS mandate violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et. seq.*, when it requires Westminster to provide services contrary to its beliefs or pay substantial fees, but allows numerous exemptions for other employers?

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Thirteenth Circuit can be found at *Sebelius v. Westminster Soc. Servs., Inc.*, No. 08-04476 (13th Cir. July 31, 2012). The unpublished order of the District Court for the District of Olympia can be found at *Westminster Soc. Servs., Inc. v. Sebelius*, No. 10-25641 (D. Olympia May 23, 2012) (order granting preliminary injunction).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 31, 2012. This Court granted Petitioner's timely petition for writ of certiorari on November 10, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respect-

ing an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

As pertinent to this case, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et. seq.*, provides that "governments should not substantially burden religious exercise without compelling justification; . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."

STATEMENT OF THE FACTS

A. Westminster Social Services, Inc.

Westminster Social Services, Inc. ("Westminster") is a 501(c)(3) organization that provides meals, shelter, and medical care to the needy of Rome City regardless of religious affiliation. Pl.'s Resp. to Def.'s Interrog. No. 1, 6. Westminster seeks to follow the instruction of Jesus Christ to love its neighbors as itself by providing essential services to those in need. Pl.'s Resp. to Def.'s Interrog. No. 5. Westminster operates a soup kitchen, an emergency shelter, and a small medical office. Pl.'s Resp. to Def.'s Interrog. No. 6. Westminster serves roughly 8,000 meals a week, provides shelter for approximately 150 individuals each night, and provides one volunteer doctor who treats about fifteen people once a week. *Id.* Less than ten percent of those individuals whom Westminster serves are members of the First Presbyterian Church of the City of Rome (the "Church") and most are not active members of any religious congregation. Pl.'s Resp. to Def.'s Interrog. No. 15. However, Westminster shares the teachings of the Holy Bible with interested individuals and assists all of the Church's members in volunteering their time and resources to serve their neighbors. Pl.'s Resp. to Def.'s Interrog. No. 5.

Westminster is a wholly owned subsidiary of the Church and entirely funded by donations to the Church. Pl.'s Resp. to Def.'s Interrog. No. 3, 7. The Church is a member of the National Presbyterian Church ("PCUSA") and contributes to every level of the PCUSA's administration. Pl.'s Resp. to Def.'s Interrog. No. 14. Westminster is a distinct legal entity governed by its own Board of Directors—twelve individuals who are appointed by the Board of Deacons of the Church. Pl.'s Resp. to Def.'s Interrog. No. 3, 4. In 2012, Westminster employed sixty full-time employees who were members of the Church, attended the twelve-week Church New

Member Preparation Course, and affirmed the Church's faith by committing to live in accord with the Church's policies and Code of Conduct. Pl.'s Resp. to Def.'s Interrog. No. 8, 9. The Code of Conduct asks all employees to faithfully attend worship, actively love and serve his or her neighbor, regularly study and read the Holy Bible, and protect and strengthen Bible-based family values. Pl.'s Resp. to Def.'s Interrog. No. 9.

Westminster provides its employees with a 403(b) retirement plan, eight-week paternity or sixteen-week maternity leave, twenty-one-days annual paid vacation, a life insurance policy, a medical insurance policy, and an optional dental insurance policy. Pl.'s Resp. to Def.'s Interrog. No. 10. Westminster pays fifty percent of the premium. *Id.* Westminster negotiated to purchase a new medical insurance policy, effective July 1, 2012, from Cargo Insurance Company. Pl.'s Resp. to Def.'s Interrog. No. 11. The new policy includes the same coverage and Westminster continues to cover fifty percent of the premium cost. *Id.*

The Church believes that all Scripture is divinely inspired. Pl.'s Resp. to Def.'s Interrog. No. 12. Consequently, the Church believes that God's commandment to Adam and Eve to "multiply and replenish the earth" supports the proposition that procreation is an essential element of a married couple's sexual relationship. *Id.* As a result, the Church believes the use of contraceptives is sinful activity and finds emergency abortifacients to be especially abhorrent. *Id.* PCUSA approves the use of pregnancy prevention services as a matter of policy. Pl.'s Resp. to Def.'s Interrog. No. 13. Westminster follows the Church's interpretation of Scripture and not PCUSA's policies. *Id.*

B. The Affordable Care Act and HHS Mandate

On March 23, 2011 President Barack Obama signed into the law the Patient Protection and Affordable Care Act (the "Act"), which includes a mandate for all covered employers with group or individual health coverage to provide certain preventative health services. 42 U.S.C. § 300gg-13(a)(4). Employers must offer the services with no co-pay or other out-of-pocket costs to their employees. 42 U.S.C. § 300gg-13(a)(4). Employers who do not adhere to the mandate are subject to a $100 fine per covered individual, per day from both the Internal Revenue Service ("IRS") and the Department of Health and Human Services ("HHS"). 26 U.S.C. §§ 4980D(b), 300gg-(b)(2)(C)(i). Employers must pay a $2,000 annual fine per full-time employee for dropping healthcare coverage com-

pletely. 26 U.S.C. §§ 4980H(a), (c)(1). Non-compliant employers are also subject to civil suits by their employees and the U.S. Department of Labor for unpaid benefits. 29 U.S.C. § 1132(a)(3).

Among the preventative care requirements that subject employers to fines are the HHS requirements to provide preventative care and screening for women (the "HHS mandate"). 42 U.S.C. § 300gg-91(a)(1). As recommended by the Institute of Medicine, the HHS mandate requires employer health plans to include the full range of contraceptive methods approved by the Food and Drug Administration. *See* Inst. of Med., Clinical Prevention Services for Women – Closing the Gaps 10 (2011). Such contraceptive methods include sterilization procedures, patient education and counseling for women able to reproduce, and pregnancy prevention devices, such as diaphragms, intrauterine devices, oral contraceptive pills, and emergency contraceptives.[1] *Id*. Despite receiving a substantial number of comments expressing concern regarding the expansive nature of the mandated pregnancy prevention services, HHS finalized its mandate on February 5, 2012.[2]

Due to concerns that the HHS mandate would force some religious employers to provide services contrary to their beliefs, HHS promulgated a narrow religious employer exemption that removes the requirement to cover pregnancy prevention services if the religious employer: (1) inculcates religious values as a purpose of its organization; (2) primarily employs persons who share the same religious tenets; (3) primarily serves persons who share the same religious tenets; and (4) is a nonprofit organization as defined by the IRS. 45 C.F.R. § 147.130(a)(1)(iv). In addition to the religious employer exemption, employers with less than fifty full-time employees or who maintain a "grandfathered" plan are exempt from the HHS mandate. 26 U.S.C § 4980H(c)(2)(A); 42 U.S.C. § 18011. Moreover, the Act as a whole exempts those religious communities that conscientiously object to the acceptance of private or public healthcare as well as members of "healthcare sharing ministr[ies]." 26 U.S.C. §§ 5000A(d)(2)(a)(i)-(ii), (d)(2)(b)(ii). According

---

1. *See Birth Control Guide*, U.S. FOOD & DRUG ADMIN. (Aug. 2012), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/WomensHealthTopics/ucm117971.htm.

2. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725 (Feb. 15, 2012) [hereinafter *Group Health Plans*] (to be codified at 45 C.F.R. pt. 147).

to HHS, about 191 million employees are exempt from the HHS mandate. 75 Fed. Reg. 34,538, 34,550 (June 17, 2010).

C. Procedural Background

Westminster brought this claim against HHS, Kathleen Sebelius, Secretary of HHS, Timothy F. Geithner, Secretary of the U.S. Department of the Treasury, the U.S. Department of the Treasury, Hilda L. Solis, Secretary of the U.S. Department of Labor, and the U.S. Department of Labor (collectively, the "Government") for violations to Westminster's First Amendment rights under the Free Exercise and Establishment Clauses and the Religious Freedom Restoration Act of 1993 ("RFRA"). *Sebelius v. Westminster Soc. Servs.,* No. 08-04476, slip op. at 8 (13th Cir. July 31, 2012). Westminster sought a preliminary injunction on May 2, 2012 to enjoin the Government from penalizing Westminster under the HHS mandate for failing to provide certain pregnancy prevention services. *Id.* The United States District Court for the Central District of Olympia granted Westminster's motion for preliminary injunction on May 23, 2012. *Id.* The United States Court of Appeals for the Thirteenth Circuit then heard an expedited appeal and affirmed the decision of the district court on July 31, 2012. *Id.* at 8, 23. This Court granted the Government's petition for writ of certiorari on November 10, 2012. *Sebelius v. Westminster Soc. Servs., Inc.*, No. 12-831 (Nov. 10, 2012) (order granting petition for writ of certiorari).

SUMMARY OF THE ARGUMENT

The Free Exercise and Establishment Clauses of the First Amendment to the Constitution afford religious employers protections against improper government intrusion. For a law to be valid, the Free Exercise Clause requires it be neutral and generally applicable, and if it is not, for the Government to justify it with a compelling interest. The Establishment Clause requires that the Government not prefer certain religious institutions to others and prevents the Government from excessively entangling itself in religious matters. The RFRA requires the Government to justify any law that substantially burdens religious practice by showing it furthers a compelling interest and uses the least restrictive means in so doing.

I.A. The HHS mandate for employers to include pregnancy prevention services in their employee health insurance plans vio-

lates the Free Exercise and Establishment Clauses of the First Amendment. The HHS mandate is not a neutral law of general applicability because it specifically infringes upon religious employers' religiously motivated practices while exempting millions of other individuals from its requirements. With the exemptions for employers with grandfathered plans or less than fifty employees, potentially more than 200 million employees are exempt from the HHS mandate. The HHS mandate also specifically infringes upon the rights of religious employers by imposing substantial fines on them for following the tenets of their faith. The HHS mandate is thereby subject to a strict scrutiny standard.

I.B. The HHS mandate allows for such broad exemptions that it is applied disproportionately in relation to its proffered goals. To increase women's overall access to healthcare or decrease the disparity between men and women's healthcare costs, the application of the HHS mandate would need to be uniform, or at least mostly uniform, because such interests apply to the public at large. Yet because of the number of exemptions, the Government is unable to promote these interests.

I.C. The HHS mandate violates the Establishment Clause because it unreasonably discriminates against outward looking institutions that possess strongly held beliefs. The HHS mandate does not burden religious employers who do not hold the same beliefs as Westminster, and thus the mandate favors such employers. The Government has not distinguished between exempt and non-exempt religious employers by whether or not they hire people of their faith, but rather by whether or not they follow a certain faith as an institution.

II.A. The HHS substantially burdens Westminster's religious exercise by forcing Westminster to modify its religious practices, thereby violating its religion. Westminster believes that pregnancy prevention services are a violation of God's commandments and thus do not provide such services to its employers. The HHS mandate presents Westminster with a false dichotomy to either violate its sincerely held religious beliefs by adhering to the mandate or to pay destructive fees that make the practice of its religion extremely difficult.

II.B. The HHS mandate fails to further a compelling governmental interest. The mandate neither broadens access to healthcare for Westminster's women employees nor decreases any supposed nationwide disparity between men and women's healthcare costs. The HHS mandate, as applied to Westminster, does not broaden women's access to healthcare because Westmin-

ster's current healthcare coverage does not deny its women employees access to a form of healthcare they desire. Because of the HHS mandate's exemptions that allow numerous employers to opt out of its requirements, the mandate also does not increase uniformity between men's and women's healthcare costs.

II.C. Even if the HHS mandate did further a compelling governmental interest, it still violates the RFRA because it is not the least restrictive means to further such an interest. Laws fail RFRA's least restrictive means test when they are overbroad or underinclusive. The HHS mandate is not the least restrictive means of furthering the Government's interests because it is overbroad. The Government could further its interests using several more narrow alternatives that burden religion to a far lesser degree, such as direct subsidies or tax cuts to women whose employers do not provide contraception coverage.

For these reasons, the HHS mandate, as applied to Westminster, violates the First Amendment Free Exercise and Establishment Clauses and the RFRA, and therefore must not be enforced against Westminster.

ARGUMENT

The HHS mandate is unconstitutional as applied to Westminster because it violates both the Free Exercise Clause and the Establishment Clause of the First Amendment. Under the Free Exercise Clause, if a law violates a religious employer's First Amendment protections and is not neutral or generally applicable, the Government must show it had a compelling interest to enforce the law to overcome the Court's strict scrutiny standard. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). Under the Establishment Clause, the Government cannot prefer certain religious institutions to others and cannot excessively entangle itself in religious matters. *See Larson v. Valente*, 456 U.S. 228, 244-47 (1982). In this case, because the HHS mandate exempts a significant number of employers from its requirements, it is not a neutral and generally applicable law, and therefore the Government has the burden of establishing a compelling interest. The Government's goal to expand healthcare and change the disparate costs across genders is not a compelling interest. Even if the Government is able to establish a compelling interest, the HHS mandate still violates the Establishment Clause by unreasonably discriminating against outward-looking religious

institutions and causing excessive entanglements between religion and government.

Additionally, the HHS mandate is invalid as applied to Westminster because it violates the RFRA. The mandate places a substantial burden on Westminster's religious exercise by requiring Westminster to disobey its religious tenets or pay destructive fees. Because the HHS mandate does not further a compelling governmental interest and is not the least restrictive means of doing so, the substantial burden placed on Westminster is not justified. *See* 42 U.S.C. § 2000bb-1(a).

I. THE HHS MANDATE, AS APPLIED TO WESTMINSTER, VIOLATES THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT BECAUSE IT IS NOT NEUTRAL OR GENERALLY APPLICABLE, IS NOT CREATED BY A COMPELLING GOVERNMENTAL INTEREST, AND UNREASONABLE DISCRIMINATES AGAINST OUTWARD-LOOKING RELIGIOUS INSTITUTIONS.

The Free Exercise and Establishment Clauses are intended to protect against the restriction of religious beliefs and practices. See Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 876-77 (1990). Because the HHS mandate is not a neutral law of general applicability and because the Government does not have a compelling interest in passing such a law, the HHS mandate violates the Free Exercise Clause and is therefore unconstitutional. Because the mandate favors inward-looking religious institutions over outward-looking institutions and requires invasive investigations into religious institutions, it violates the Establishment Clause and is therefore also unconstitutional on this basis.

A. The HHS mandate is not a neutral law of general applicability because it specifically infringes upon religious institutions' religiously motivated practices and exempts millions of individuals from the mandate's requirements, thereby subjecting it to a strict scrutiny standard.

The Free Exercise Clause of the First Amendment states, "Congress shall make no law…prohibiting the Free Exercise [of religion]. U.S. CONST. amend. I. This Clause protects against "religious persecution and intolerance." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The Government violates the Free Exercise Clause

when it passes a law or regulation that is not neutral or generally applicable and lacks a compelling interest. *Lukumi*, 508 U.S. at 546. A law that is not neutral is not generally applicable. *See id.* at 531.

> 1. The HHS mandate is not generally applicable because it is underinclusive to its stated end by exempting millions of employees of uncovered employers who maintain a grandfathered plan, employers with fewer than fifty employees, or those that qualify as a "religious employer."

To be generally applicable, a law may treat religious institutions and secular institutions unequally. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987). This inequality results when the law seeks to further interests in opposition to religiously motivated conduct. *Lukumi*, 508 U.S. at 542-43. A law that contains too many exceptions to achieve its stated end is not a generally applicable law. *See id.* at 543, 546.

The HHS mandate is not a generally applicable law because, like in *Lukumi* where the ordinances prohibiting animal cruelty contained too many exemptions to be valid, the HHS mandate is replete with too many exemptions. *See id.* at 546. Employers with fewer than fifty employees are categorically exempt from the mandate's coverage. 26 U.S.C. § 4980H(c)(2)(A). According to HHS, this exemption alone excludes 34 million employees from the mandate.[3] In addition, employers with "grandfathered plans" are exempt from the mandate. 42 U.S.C. § 18011. According to interim final rules issued by the Departments of Labor, Treasury, and HHS, as many as 191 million employees are exempted from the HHS mandate under the "grandfathering" exemption. 75 Fed. Reg. 34,538, 34,550 (June 17, 2010); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at *18 (D.D.C. Nov. 16, 2012). These exemptions allow potentially more than 200 million employees – a significant portion of the American population – to avoid mandated contraception coverage.

The HHS mandate also provides a categorical exemption to certain religious employers whose primary objective is the teaching of their religious beliefs, who primarily employ or serve mem-

---

3. Newsroom, *Increasing Choice and Saving Money for Small Businesses*, U.S. DEP'T OF HEALTH & HUM. SERVS. (December 12, 2012), http://www.healthcare.gov/news/factsheets/2010/06/increasing-choice-and-saving-money-for-small-businesses.html.

bers of their faith, and who qualify as a nonprofit organization. 45 C.F.R. § 147.130(a)(1)(iv). These qualifications allow many churches, synagogues, and other worship communities to be exempt from the mandate while excluding religious employers like Westminster. *See id.*

The numbers of employees of both religious and non-religious employers who are exempt from the HHS mandate are so high that the mandate cannot be generally applicable. The mandate is so vastly underinclusive that the Government cannot significantly broaden the healthcare market or decrease the disparity in costs among men and women. [4] *See* Group Health Plans, 77 Fed. Reg. 8,725. Like the ordinances in *Lukumi* that burdened religious interests more than nonreligious interests by being vastly underinclusive, the HHS mandate fails to subject commercial institutions to its restrictions to a similar or greater degree than religious employers like Westminster. *See Lukumi*, 508 U.S. at 543. Such an underinclusive law that subjects a few religious employers to its requirements while exempting a vast number of religious and nonreligious employers is inequitable and fails to be generally applicable. *See id.*

> 2. The HHS mandate is not neutral because it specifically infringes upon the rights of religious institutions to engage in religiously motivated conduct.

A law fails to be neutral when, considering its text, application, and legislative history, the law restricts certain religious practices because of their religious motivation. *Smith*, 494 U.S. at 878-89; *Lukumi*, 508 U.S. at 522, 535, 540-43. Laws that contain "subtle departures from neutrality" or "covert suppression of particular religious beliefs" are not neutral. *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Bowen*, 476 U.S. at 703. A law is not neutral when it imposes either criminal or civil penalties on religious prac-

---

4. Laws that have been upheld as neutral or generally applicable are those that are much more broadly applicable and integral to the government's interests than the mere equalization of healthcare costs, and have only incidental, if any, adverse effects on religious practice. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a mother is subject to child labor laws notwithstanding her religion); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (holding that Sunday-closing laws were valid despite the claim they burdened people who did not work on Sundays for religious reasons); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (holding that the Selective Service System was valid against the claim it violated the free exercise rights of those who opposed a particular war).

tices. *See Lukumi*, 508 U.S. at 547 (finding that the city ordinances were not generally applicable when criminal penalties were imposed for a specific religious ritual). *See also Locke v. Davey*, 540 U.S. 712, 720 (2004) (finding that a law may not be neutral when "it imposes neither criminal nor civil sanctions on any type of religious service or rite.").

The HHS mandate is not a neutral law in operation as its legislative history suggests. First, the mandate grants exemptions to entirely insular religious employers but not to those who seek only to serve the public at large in conformance with their religious beliefs. *See* 45 C.F.R. § 147.130(a)(1)(iv). The mandate exempts private non-religious employers for commercial reasons, such as having a "grandfathered" plan or less than fifty employees, but does not exempt religious employers like Westminster that seek only to follow their religious teachings. *See* 26 U.S.C. § 4980H (c)(2)(A); 42 U.S.C. § 18011. The mandate also imposes substantial fines and other penalties on Westminster for refusing to provide to its religious employees abortifacient contraceptives.[5] Failing to provide these contraceptives triggers a fine of $100 per employee, per day, 26 U.S.C. § 4980D(b), and exposes non-compliant employers to Employee Retirement Income Security Act suits for failure to provide the mandated services. 29 U.S.C. §§ 1185d(a)(1), 1132(a)(1)(B). Dropping employee health coverage altogether would subject Westminster to an annual penalty of $2,000 per employee. 26 U.S.C. §§ 4980H(a), (c)(1). Thus, the HHS mandate, as applied to Westminster, forces the religious group to either cease its operations entirely to avoid violating its beliefs, suffer a daily penalty of $6,000, or suffer a total penalty of $120,000.

Second, in drafting the HHS mandate, HHS specifically excluded certain religious employers like Westminster from the religious employer exemption. The mandate and religious exemption

---

5. The Institute of Medicine recommended that "All Food and Drug Administration approved contraceptive methods [and] sterilization procedures" be included in the HHS mandate. Institute of Medicine, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011). Included in this recommendation were the drugs *levonorgestral* (commonly known as "Plan B" or the "morning-after pill") and *ulipristal* (commonly known as "Ella" or the "week-after pill"), both of which Westminster considers to be abortifacients. *See* Pl.'s Resp. to Def.'s Interrog. No. 12. The Food and Drug Administration specifically notes that Plan B and Ella prevent "attachment or implantation" of a fertilized egg to a woman's uterus. *See Birth Control Guide*, U.S. FOOD & DRUG ADMIN. (Aug. 2012), http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications /UCM282014.pdf.

provoked significant outcry from many who opposed these measures. Group Health Plans, 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012) (noting that the Departments of Labor, Treasury, and HHS "received over 200,000 responses" to the request for comments on the religious employer exemption"). Despite many comments from those concerned about the mandate and the significant adverse effect it would have on religious employers not covered under the narrow religious exemption, HHS announced that it would not broaden or change the religious employer exemption.[6] *See* Group Health Plans, 77 Reg. 8,725, 8,730 (Feb. 15, 2012). Furthermore, on October 5, 2011, six days after the comment period ended, Secretary Sebelius declared to National Association for the Repeal of Abortion Laws Pro-Choice America that "we are in a war."[7] Similar to the city ordinances passed in *Lukumi* where the city councilors specifically targeted what they considered an "abhorrent" religious practice, *Lukumi*, 508 U.S. at 541, here HHS specifically drafted the HHS mandate to include religious employers like Westminster who oppose emergency abortifacients on religious grounds. *See* Pl.'s Resp. to Def.'s Interrog. No. 12.

Westminster does not qualify for the religious employer exemption and is thus faced with the decision of entirely ceasing its operations or suffering severe financial penalties. The HHS mandate specifically subjects Westminster to such grave fines for merely continuing to function as a religious employer in conformance with its religious teachings, and is therefore not a neutral law.

B. The Government's proffered interests in imposing the HHS mandate are not "compelling governmental interests" because the mandate is underinclusive due to its many exemptions.

The Government contends that the HHS mandate furthers two of its interests: (1) increasing women's access to healthcare by broadening the healthcare market; and (2) decreasing the disparity between men and women's healthcare costs. However, neither of these interests constitutes a "compelling governmental interest" because the mandate is underinclusive in achieving them. *See*

6. HHS Press Office, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, U.S. DEP'T OF HEALTH AND HUM. SERVS (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

7. Thomas, *Sec. Sebelius Speaks Out for Women's Health and Privacy at NARAL Event*, BLOG FOR CHOICE (Oct. 6, 2011), http://www.blogforchoice.com/archives/2011/10/sec-sebelius-sp.html.

Lukumi, 508 U.S. at 543-46. The HHS mandate's numerous exemptions allow potentially more than 200 million employees to go without the mandated contraception coverage. *See* 75 Fed. Reg. 34,538, 34,550 (June 17, 2010) (describing that as many as 191 million employees are exempted from the HHS mandate under the "grandfathering" exemption); *Statistics about Business Size*, U.S. CENSUS BUREAU (Jan. 4, 2012), http://www.census.gov/econ/smallbus.html (describing that as many as twenty-million employees are exempted from the HHS mandate because their employers have less than fifty employees).

Because so many employers, and thus their employees, are exempted from the HHS mandate, the mandate cannot further either of the Government's interests. *See Lukumi*, 508 U.S. at 546. To reflect increasing a compelling interest in women's overall access to healthcare or decreasing the disparity between men and women's healthcare costs, application of the HHS mandate would need to be uniform, or at least mostly uniform, because the asserted interests apply to the public at large. However, the mandate allows such broad exemptions that it is applied disproportionately in relation to its proffered goals. Given that the Government is unlikely to promote its interests through the application of the HHS mandate, those interests cannot be said to be "of the highest order," and are therefore not "compelling." *The Florida Star v. B.J.F.,* 491 U.S. 524, 542 (1989).

C. The HHS mandate violates the Establishment Clause because it unreasonably discriminates against outward-looking institutions that possess strongly held beliefs and serve individuals not of their faith.

The religious employer exemption to the HHS mandate is also a violation of the Establishment Clause, because it prefers certain religious institutions to others. The Government contends that the religious employer exemption is a permissible distinction made for employers who inculcate religious values, employ and serve persons sharing those values, and are nonprofit organizations as defined by the Internal Revenue Code, and therefore does not discriminate based on religious denomination. 45 C.F.R. § 147.130(a)(1)(iv)(B). Yet this distinction subjects Westminster to discriminatory penalties because of its firmly held religious beliefs against contraceptives. Rather than discriminating against organizations with beliefs like Westminster, the Government should instead make a reasonable distinction between religious employers

who hire employees of the same faith and religious employers who do not. Religious employers who hire persons of the same faith and who do not believe in the use of contraceptives should not be forced to adhere to the HHS mandate. If the Government truly wishes to protect women who desire to use contraceptive services, the HHS mandate should only be applied to those employers who hire persons outside of their faith who may not hold the same beliefs against the use of contraceptives.

The Establishment Clause of the First Amendment to the Constitution states that, "Congress shall make no law respecting an establishment of religion…" U.S. CONST. amend. I. The Clause was intended to ensure that every religious denomination would have an equal opportunity to practice its beliefs.[8] *Larson v. Valente*, 456 U.S. 228, 244-47 (1982). Thus, laws may not give preference to certain religious employers over others and must instead maintain denominational neutrality. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947); *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968).[9]

The HHS mandate gives preferential treatment to those who do not have strongly held beliefs concerning the use of contraceptives. Religious employers similarly situated to Westminster, who do not hold the same beliefs but also serve members of a different faith, are not unreasonably burdened by the HHS mandate. Thus, as in *Larson* where the fundraising restrictions targeted one, unpopular religious group, 456 U.S. at 246-51, the HHS mandate specifically subjects religious employers like Westminster to severe penalties for adhering to the tenets of its faith. *See Sebelius v. Westminster Soc. Servs.,* slip op. at 18. Though such beliefs regarding contraceptives may be unpopular, such beliefs are the most deserving of First Amendment protection.

---

8. James Madison stated that the "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." THE FEDERALIST No. 51, at 326 (James Madison) (H. Lodge ed. 1908).

9. Excessive entanglements or the invasive investigation into the "religious content" of certain institutions also violates the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 614-24 (1971). Westminster recognizes it does not qualify under the definition of "religious employer" in the Act as currently drafted. However, the determination of whether Westminster and other religious institutions in the future would qualify as "religious employers" would require an invasive investigation to determine whether they "primarily employ" and "primarily serve" members of their faith, which violates the Establishment Clause.

Furthermore, the Government has chosen to create a discriminatory exemption that is only applicable to religious employers that adhere to a certain faith tradition and also serve the public, rather than creating an exemption for all religious employers that hire inside their faith. Thus, a religious institution like Westminster that hires entirely within its own denomination and whose employees are unlikely to request such contraceptives are subjected to the severe penalties of the HHS mandate because they seek to serve the public. Pl.'s Resp. to Def.'s Interrog. No. 12. Even if the Government defined religious employers by the identity of their clients, doing so would create an "element of government evaluation" that the Establishment Clause seeks to minimize. *See Walz v. Tax Comm'n of New York*, 397 U.S. 664, 674 (1970). Although the Government may be able to draw administrative lines, drawing the line between those who adhere to a certain religious belief and those who do not fails to further the Government's proffered intentions of creating a more efficient healthcare market and minimizing disparate costs and violates the Establishment Clause. *See id.*

The Government's arbitrary line drawing forces religious institutions to either cease service to the poor to gain coverage under the religious employer exemption or be subject to severe penalties. This burden would not exist if the Government redefined the religious employer exemption by encouraging outward-looking religious institutions to continue to provide healthcare services to the public. Drawing the line at religious institutions that hire outside of their faith, as opposed to those who provide public services outside of their faith, would avoid this consequence.[10] If the HHS mandate continues to be applied to religious organizations in this manner, it will severely hinder the role such institutions play in providing healthcare for the poor.

The HHS mandate violates the Establishment Clause because it arbitrarily exempts religious employers based upon whom they serve instead of whom they hire. This arbitrary line drawing sub-

10. As the Thirteenth Circuit aptly noted, the Supreme Court's recent decision to unanimously protect the internal functioning of religious employers through the ministerial exemption in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), demonstrates this Court's respect for the internal governance of religious employers. *Sebelius v. Westminster Soc. Servs.*, slip op. at 17 n.9. However, this case does not stand for the proposition that the Government should draw the line on which religious institution provides a public service, but rather whether the employees it hires are within the religious structure of that institution.

jects religious employers like Westminster to unreasonable discrimination in violation of the Establishment Clause.

II. THE HHS MANDATE VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 ("RFRA") BECAUSE IT SUBSTANTIALLY BURDENS WESTMINSTER'S RELIGIOUS EXERCISE, DOES NOT FURTHER A COMPELLING GOVERNMENTAL INTEREST, AND IS NOT THE LEAST RESTRICTIVE MEANS OF FURTHERING SUCH AN INTEREST.

The RFRA prohibits the Government from substantially burdening a person's religious exercise, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), unless the Government can "demonstrat[e] that application of the burden to the person (1) [furthers] a compelling governmental interest, and (2) is the least restrictive means of furthering that ... interest." 42 U.S.C. § 2000bb-1(b). Congress enacted the RFRA to protect religious persons from substantial burdens placed on them by the Government under the guise of "generally applicable" laws. 42 U.S.C. § 2000bb(a)(2). Thus, even if a law appears to be generally applicable, rather than directed at religious persons, the law may still be invalid if it substantially burdens a religious person. *Id*. The RFRA only allows such burdens if the Government meets the statute's compelling interest test – a strict scrutiny test that requires the challenged law to further a compelling governmental interest and be the least restrictive means to further that interest. § 2000bb-1(b). Because the HHS mandate (1) substantially burdens Westminster's religious exercise, (2) does not further a compelling governmental interest, and (3) is not the least restrictive means of furthering such an interest, the mandate violates the RFRA and is therefore invalid.

A. The HHS mandate places a substantial burden on Westminster's religious exercise because it forces Westminster to modify its religious practices, thereby violating its religion, or pay devastating fees.

The HHS mandate places a substantial burden on Westminster's religious exercise by forcing the organization to cease its operations, violate its religious beliefs, or pay devastating fees. When the Government puts "substantial pressure on an adherent [to the law] to modify his behavior and to violate his beliefs, a bur-

den upon religion exists," even if such pressure is indirect. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). Courts generally assume that a person's religious exercise is burdened if the person makes such a claim because "it is not within the judicial function and judicial competence to inquire" whether a person correctly understands his religion. *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012) (quoting *Thomas*, 450 U.S. at 716).[11] Because "courts are not arbiters of scriptural interpretation," they cannot adequately assess whether a person's religious belief is sincere. *Thomas*, 450 U.S. at 716.

Still, even though it need not do so, Westminster has demonstrated that its religious beliefs regarding pregnancy prevention services are sincere. The First Presbyterian Church (the "Church") wholly owns and funds Westminster and appoints Westminster's Board of Directors. Pl.'s Resp. to Def.'s Interrog. No. 3-4, 7. The Church sincerely believes that "procreation is an essential element of a married couple's sexual relationship." Pl.'s Resp. to Def.'s Interrog. No. 12. Because God commands Adam and Eve in the book of Genesis to "multiply and replenish the earth," the Church believes that "sexual activity must be accompanied by the possibility of procreation" to fulfill that command. *Id.* Given that contraceptives directly impede procreation, the Church believes the use of contraceptives is sinful. *Id.*

As an extension of the Church, Westminster has instituted policies to promote its beliefs and therefore does not provide insurance to its employees for pregnancy prevention services. Westminster defines such services as "products and services that inhibit or destroy human fertility." *Id.* Westminster only employs members of the Church who commit to live according to the Church's beliefs. Pl.'s Resp. to Def.'s Interrog. No. 9. Although the Church is a member of the National Presbyterian Church ("PCUSA"), which does not believe that use of contraceptives is sinful, the affiliation has no bearing on Westminster's beliefs as Westminster only follows the policies of the Church, not the

11. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 257 (1982) ("We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith."); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) ("[W]e will assume that undoing May's dreadlocks imposes a substantial burden on his exercise of Rastafarianism."); *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) ("[W]e assume that the regulations and policies at issue in the present case substantially burden Hamilton's exercise of his religion.").

PCUSA. Pl.'s Resp. to Def.'s Interrog. No. 14. As a group of religious persons, Westminster is free to determine its own beliefs and policies, and is not bound by the policies of the PCUSA. *See Thomas*, 450 U.S. at 415-16.

Because Westminster is composed of a group of persons who adhere to the same sincere beliefs, the RFRA protects it against substantial burdens on its religious exercise. 42 U.S.C. § 2000bb-1. The HHS mandate, however, places a substantial burden on Westminster's religious beliefs because it forces Westminster to violate them or pay a substantial fine for following them. Westminster does not provide pregnancy prevention services in its employee health insurance plans because such a practice would violate its belief that the provision or use of such services is sinful. Pl.'s Resp. to Def.'s Interrog. No. 12. The HHS mandate also supports the use of abortifacients, which Westminster considers to be especially abhorrent. Pl.'s Resp. to Def.'s Interrog. No. 12.

If Westminster was forced to comply with the HHS mandate, such action would directly violate its religious belief against the provision or use of pregnancy prevention services, and therefore it could not fully practice its religious beliefs. 42 U.S.C. § 2000bb-1. If, on the other hand, Westminster decided to continue to adhere to its beliefs and refused to comply with the HHS mandate, it would be faced with $100 fines per day, per employee. *See* 26 U.S.C. §§ 4980D(b), 300gg-(b)(2)(C)(i). With sixty employees, Westminster's daily fine would amount to $6,000. If Westminster decided to drop healthcare coverage completely, it would suffer a $2,000 annual fine per full-time employee. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Because Westminster relies on donations from the Church, serves 8,000 meals per week, and provides shelter for 150 individuals per night, Pl.'s Resp. to Def.'s Interrog. No. 6-7, the daily $6,000 cost or $120,000 annual cost imposed by the HHS mandate could easily make Westminster non-existent, and therefore prevent Westminster from furthering its religious mission. Such an "onerous tax [could] effectively choke off [Westminster's] religious practices." *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392 (1990).

Thus, the HHS mandate forces Westminster to choose one of two very unacceptable options – either to violate its religious beliefs by adhering to the mandate or to make the practice of its religion extremely difficult by paying destructive fees. The threat of Westminster's destruction "necessarily places substantial pressure on [Westminster] to violate [its] beliefs," and thus, "such a Hobson's choice" demonstrates that the HHS mandate places a sub-

stantial burden on Westminster's religious exercise. *Tyndale*, 2012 WL 5817323, at *12.

B. The HHS mandate fails to further a compelling governmental interest because it neither broadens access to healthcare for Westminster's women employees, nor decreases any supposed nationwide disparity between men and women's healthcare costs due to its numerous exemptions.

The Government contends that the HHS mandate furthers two of its interests: (1) increasing women's access to healthcare by broadening the healthcare market; and (2) decreasing the disparity between men and women's healthcare costs. *See Sebelius v. Westminster Soc. Servs.,* slip op. at 23; Group Health Plans, 77 Fed. Reg. at 9,166. However, such interests are not "compelling governmental interests," and even if they were, the HHS mandate does not actually *further* them either in this particular situation or generally because it neither increases access to healthcare for Westminster's women employees, nor decreases the disparity between men and women's overall healthcare costs.

1. The HHS mandate, as applied to Westminster, does not broaden women's access to healthcare because Westminster's current healthcare coverage does not deny its women employees access to a form of healthcare they desire.

Congress intended the RFRA to reinstate the compelling interest test from *Sherbert v. Verner*, 347 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) – a strict scrutiny test that is only satisfied through direct application to the person whose exercise of religion is being burdened. *Gonzalez v. O'Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). Although the Government may impose a law applicable to the general public that furthers governmental interests on a broad scale, if such a law burdens a person's religious exercise, the law is only justified if it furthers a compelling governmental interest as applied to the particular burdened person, rather than the general public. *Id.* at 430. Here, the Government has the burden of showing either that the HHS mandate furthers a compelling governmental interest specifically as applied to Westminster, or that Westminster's specifically requested injunction against the mandate impedes a compelling governmental interest. *Id.* at 431 (quoting *Yoder*, 406 U.S. at 213, 236); *Tyndale*, 2012 WL 5817323, at *16.

Because Westminster only hires employees who are members of the Church and requires potential employees to affirm its commitment to the Church and to follow the Church's policies, Pl.'s Resp. to Def.'s Interrog. No. 9, there is no reason to doubt that Westminster's women employees adhere to the same religious beliefs as the Church. As stated by Westminster, it is "confident that its employees adhere to the teachings and practices of the First Presbyterian Church because each employee must . . . live according to the [C]hurch's teachings before he or she is hired at the organization." Pl.'s Resp. to Def.'s Interrog. No. 17. Because the Church believes that the use of contraceptives is sinful, it is likely that Westminster's women employees do not desire access to contraceptive coverage. Thus, even if Westminster complies with the HHS mandate, the mandate would not increase access to healthcare for Westminster's women employees, but rather such access would likely remain the same. Accordingly, the HHS mandate cannot further the government's interest of increasing women's access to healthcare when specifically applied to Westminster. Additionally, Westminster's requested injunction would not impede the Government's interest in increasing women's access to healthcare as such access would remain the same with or without the injunction.

> 2. Because the HHS mandate's exemptions allow numerous employers to opt out of its requirements, the mandate does not increase uniformity of men and women's healthcare costs.

Even if this Court were to judge the furtherance of the Government's interests on a broader scale – the overall disparity between men and women's healthcare costs rather than Westminster's women employees' specific access to healthcare – the HHS mandate still does not further a compelling governmental interest. The HHS mandate's broad exemptions fatally undermine the mandate's impact on the disparity between men and women's healthcare costs because they allow numerous groups to opt out of the mandate.

First, the mandate exempts religious employers that meet certain specified criteria. Group Health Plans, 77 Fed. Reg. 9,167 (Feb. 15, 2012). Although the Government contends that the religious employer exemption is intended to be narrow in scope, it exempts all religious employers whose purpose is to teach their beliefs, who primarily employ and serve members of their faith, and

who qualify as a nonprofit organization. 45 C.F.R. § 147.130(a)(1)(iv). Such broad criteria virtually allow all churches, synagogues, and other worship communities to be exempt from the mandate as such communities easily meet the qualifications. *See id.* Additionally, the Act as a whole exempts those religious communities that conscientiously object to the acceptance of private or public healthcare, 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii), as well as members of "healthcare sharing ministr[ies]," § 5000A(d)(2)(b)(ii).

Second, the Act exempts all employers with fewer than fifty employees, 26 U.S.C § 4980H (c)(2)(A), thereby excluding more than twenty million employees from the HHS mandate.[12] Third, the Act exempts all "grandfathering" institutions – institutions that have not made any significant changes to their healthcare plans since March of 2010. 42 U.S.C. § 18011. According to interim final rules issued by the Departments of Labor and the Treasury and HHS, as many as 191 million employees are exempted from the HHS mandate under the "grandfathering" exemption. 75 Fed. Reg. 34,538, 34,550 (June 17, 2010); *Tyndale*, 2012 WL 5817323, at *18.

With exemptions for so many employees, the HHS mandate does not further the Government's interest of decreasing the disparity between men and women's healthcare costs. Those costs are virtually unaffected by the HHS mandate because it is so "woefully underinclusive as to render belief in [its] purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Like in *O Centro*, where this Court held that the peyote exception to the Controlled Substances Act undermined the Government's interest in preventing the plaintiff from using a similar drug, 546 U.S. at 433, the HHS mandate's several exemptions undermine the Government's interest in forcing Westminster to provide services that numerous similar organizations do not have to provide. Because the Government's submitted interest applies to both employers subject to the mandate and those exempt, it is difficult to understand how that same interest "alone can preclude any consideration of a similar exception" for a similarly situated group of persons like Westminster. *O Centro*, 546 U.S. at 433.

Given that so many employers are already exempt from the HHS mandate, the Government is unable to show that the man-

12. *Statistics about Business Size*, U.S. CENSUS BUREAU (Jan. 4, 2012), http://www.census.gov/econ/smallbus.html.

date enhances uniformity of healthcare costs. Therefore, it does not and cannot further the Government's proffered interests.

C. Even if the HHS mandate did further a compelling governmental interest, it is not the least restrictive means of furthering such an interest because several less burdensome alternatives exist.

Statutes fail the RFRA's least restrictive means test when they are "overbroad" or "underinclusive." *See Lukumi,* 508 U.S. at 546. If an alternative to a statute exists that would burden religious groups to a lesser degree while still furthering the Government's interests, the statute cannot be the least restrictive means of furthering those interests. *See id.* The HHS mandate is not the least restrictive means of furthering the Government's interests because it is overbroad. The Government could further its interests using several more narrow alternatives that "burden religion to a far lesser degree." *Id.*

Although circuit courts disagree on how to apply the least restrictive means test, the Government is incapable of meeting the test even when applied in the manner most favorable to the Government. Currently, the Tenth Circuit Court of Appeals applies the least restrictive means test most favorably to the Government. *See United States v. Wilgus*, 638 F.3d 1274, 1288–89 (10th Cir. 2011). According to that Circuit's application, although the Government need not "refute every conceivable option in order to satisfy the least restrictive means prong of [the] RFRA,"[13] it still must "refute the alternative schemes offered" by Westminster. *Legatus*, 2012 WL 5359630, at *12 (citing *Wilgus*, 638 F.3d at 1288–89).

Westminster has offered several workable alternatives to the HHS mandate including (1) direct subsidies or tax credits to women whose employers do not provide contraception coverage, and (2) provision of contraception coverage from public health clinics. *Sebelius v. Westminster Soc. Servs.*, slip op. at 20. Because both alternatives would provide coverage directly from the federal government, rather than forcing employers to provide such coverage,

13. *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996) (characterizing such a requirement as a "herculean burden"); *accord Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008) (considering the identical language of the Religious Land Use and Institutionalized Persons Act ("RLUIPA")); *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997).

they would not place any burdens on religious exercise. Rather, each individual employee could decide whether or not to accept subsidies or tax credits from the Government to provide for contraception services. Both alternatives would allow religious persons to choose whether or not to support contraception services, rather than having such support forced on them. The Government has not even attempted to demonstrate that either alternative scheme is infeasible.

Even if the Government attempted to refute Westminster's alternatives as impractical, it still would not be able to show that the HHS mandate is the least restrictive means of furthering its interests. The Government already provides contraception coverage to many women across the nation,[14] and thus expanding such coverage is not "impractical" just because it would increase the Government's costs. *See Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 WL 3069154, at *8 (D. Colo. July 27, 2012). The alternatives proposed are reasonable because either option would only require the Government to expand the services it already provides and either option could be applied in a less confusing manner than the HHS mandate with its multiple exemptions. *See Abordo v. Hawaii*, 938 F.Supp. 656, 662 (D. Haw. 1996). Finally, when implementing either alternative, the Government would not face logistical or administrative obstacles sufficient to restrain its interests because it already has systems and programs in place to easily implement either alternative. *See Newland*, 2012 WL 3069154, at *8. Because Westminster's alternatives would lessen the burden on religious persons while furthering the Government's interests,

---

14. Cynthia Dailard, *Issues & Implications: State Coverage of Contraceptive Laws*, The Guttmacher Report, Vol. 2, No. 4 (1999) (stating that the Federal Government guaranteed contraception coverage for all of its employees under the Federal Employees Health Benefits Plan in 1998); Equity in Prescription Insurance and Contraceptive Coverage Act, S.104 § 704 (2001) (stating that the proposed contraceptive coverage for federal women employees would reach nearly two million women); *Contraceptive needs and services, 2006*, GUTTMACHER INSTITUTE, http://www.guttmacher.org/pubs/win/index.html (last visited Mar. 21, 2013) (stating that in 2006, more than nine-million women – 54% of all women in need of publicly subsidized care – received publicly funded contraceptive services); Jennifer J. Frost, Rachel Benson Gold, Lori Frohwirth & Nakeisha Blades, *Variation in Service Delivery Practices Among Clinics Providing Publicly Funded Family Planning Services in 2010,* GUTTMACHER INSTITUTE (May 2012), http://www.guttmacher.org/pubs/clinic-survey-2010.pdf (stating "Oral contraceptives, injectables (e.g., Depo Provera) and condoms are provided by more than 9 in 10 publicly funded family planning centers; 80% offer emergency contraceptive pills.").

and the Government has not attempted to refute those alternatives, the Government has failed to show that the HHS mandate is the least restrictive means of furthering its interests.

Considering the substantial burden placed on Westminster by the HHS mandate, and the Government's failure to prove that the mandate furthers a compelling governmental interest, the mandate violates the RFRA. Even if the Government could prove that the HHS mandate furthers a compelling governmental interest, the mandate is not the least restrictive means of doing so, and therefore, the mandate still violates the RFRA.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals for the Thirteenth Circuit.