No. 13-5069

# In the U.S. Court of Appeals for the District of Columbia Circuit

FRANCIS A. GILARDI; GILARDI; PHILIP M. GILARDI; FRESH UNLIMITED INCORPORATED, DOING BUSINESS AS FRESHWAY FOODS; AND FRESHWAY LOGISTICS INCORPORATED,
*Plaintiffs-Appellants,*

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and SETH D. HARRIS, in his official capacity as Acting Secretary of United States Department of Labor,
*Defendants-Appellees.*

APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

## ***AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") presents the following certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

Eagle Forum adopts Appellants' statement of parties and *amici.*

B. Rulings Under Review

Eagle Forum adopts Appellants' statement of rulings under review.

C. Related Cases

Eagle Forum adopts the Appellants' statement of related cases.

Dated: May 7, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") states that (a) Eagle Forum is a non-profit, tax-exempt corporation under §501(c)(3) of the Internal Revenue Code with no parent corporation; (b) no publicly traded entity – or any other entity – holds a ten-percent ownership interest in Eagle Forum; and (c) Eagle Forum is an education and legal defense fund that – as relevant to this litigation – advocates for traditional American values and constitutional government, including governmental respect for freedom of religion and for the rule of law.

Dated: May 7, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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## IDENTITY, INTEREST AND AUTHORITY TO FILE

*Amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") files this brief with the consent of all parties. Eagle Forum is an Illinois nonprofit corporation organized in 1981. For over thirty years, it has defended principles of limited government and individual liberty, including freedom of religion. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.[1]

## STATEMENT OF THE CASE AND FACTS

This litigation presents two important questions. First, can administrative agencies violate the procedural requirements for rulemaking and, by administrative fiat, override state insurance laws on both conscience protection and preventive care, thereby forcing employers to provide health insurance that offers treatments – such as abortifacients and contraceptives – that violate the employers' faith? Second, can the affected public challenge such overreach under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA")? *Amicus* Eagle Forum respectfully submits that the answers are "no" to the first question and "yes" to the second.

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[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

Acting under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"), the defendants-appellees Departments of Health & Human Services ("HHS"), Labor, and Treasury and their respective Secretaries (collectively, the "Administration") have injected these controversial requirements to implement PPACA's general directive that "health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for … with respect to women, such additional preventive care and screenings … as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. §300gg-13(4). To implement this provision, the Administration promulgated two interim final rules, 75 Fed. Reg. 41,726 (2010); 76 Fed. Reg. 46,621 (2011), which together adopt the Health Resources and Services Administration's *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011). In pertinent part, the guidelines require health plans to include "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" (hereinafter, the "Mandate").

Two brothers – Francis and Philip Gilardi (collectively, the Gilardis) – and the two closely-held Subchapter S corporations that they own – Fresh Unlimited Incorporated and Freshway Logistics Incorporated (collectively, the "Freshway

Companies") – have sued the Administration under the First Amendment and RFRA to enjoin the Mandate's preventing the plaintiffs (collectively, "Plaintiffs") from running their affairs according to their faith. As supplemented here, *amicus* Eagle Forum adopts Plaintiffs' Statement of Facts. *See* Gilardi Br. at 6-16.

Under Plaintiffs' Catholic faith, the Mandate's requirements are sinful:

> In this context, it is not possible to anaesthetize consciences, for example, concerning the effects of particles whose purpose is to prevent an embryo's implantation or to shorten a person's life…. In the moral domain, your Federation is invited to address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia.

Pope Benedict XVI, *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007); *see also* Pontifical Academy for Life, *Statement on the So-Called 'Morning-After Pill'* (Oct. 31, 2000) ("the proven 'anti-implantation' action of the *morning-after pill* is really nothing other than a chemically induced abortion [and] from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to distributing, prescribing and taking the *morning-after pill*") (emphasis in original). Although it offers its rival interpretations, the Administration does not question the sincerity of Plaintiffs' beliefs and faith.

## STANDARD OF REVIEW

Federal appellate courts review the granting or denial of a preliminary injunction for abuse of discretion. *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012). Because a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), federal appellate courts review district courts' underlying legal conclusions *de novo.*

The "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011) (majority); *id.* at 2521 (Thomas, J., dissenting). Particularly in interlocutory appeals on preliminary injunctions – which analyze movants' likelihood of later prevailing on the merits – appellate courts should consider *amicus* arguments that the parties are free to adopt both on appeal and in the future merits proceedings.

## SUMMARY OF ARGUMENT

In their capacity as shareholders, the Gilardis have standing to review government actions that control the range of actions that the Freshway Companies can or must take, which in turn affect how the Gilardis will weigh their voting as

shareholders to ensure that the Freshway Companies operate ethically. As such, although the Gilardis and Freshway Companies have their own standing to challenge the Mandate for the reasons articulated in their brief, the Gilardis also have standing *as shareholders* of the Freshway Companies (Section I).

Promulgating the Mandate without notice-and-comment rulemaking violated not only the Administrative Procedure Act ("APA") (Section II.B) but also the Constitution (Section II.A). As a result, the Mandate commands no deference and cannot qualify as either a compelling interest under RFRA or even a public interest under the test for preliminary injunctions (Section II.C). With respect to the free exercise of religion, the Administration has no right to impose its orthodoxy on Plaintiffs, and its ham-fisted attempt to define abortion as a matter of "federal law" is wrong as a matter of federal law and basic reproductive science (Section III.A). Similarly, the Supreme Court already has rejected the Administration's attempt to deny religious freedom to corporations (Section III.B). Because government action related to – and effects correlated with – the ability to get pregnant are not necessarily sex-discrimination, the Mandate does not qualify as a compelling government interest to remedy sex discrimination (Section III.C).

On the merits, PPACA's delegation to the Administration is impermissibly open-ended and standardless (Section IV.A), which is all the more inappropriate in this area of traditional *state* regulation, where federal agencies have purported to

adopt preemptive rules – without notice-and-comment rulemaking, no less – notwithstanding the presumption *against* preempting state laws in fields of traditional state concern (Section IV.B). Indeed, the presumption against preemption allows this Court to interpret PPACA narrowly, without resort to the Administration's interpretation (Section IV.C). Viewed without deference to the Administration and with deference instead to the states in our federalist structure, PPACA's requirement for "preventive care" suggests prevention of *disease,* not the prevention of pregnancy (Section IV.D).

## ARGUMENT

### I. THE GILARDIS HAVE STANDING *AS SHAREHOLDERS* TO CONCERN THEMSELVES WITH THE ACTIONS THAT THE COMPANIES TAKE

The district court found a division between the actions that the Gilardis take as individuals and the actions that the Freshway Companies take as corporations. While *amicus* Eagle Forum agrees with the arguments that the Giraldis and the Freshway Companies make on their respective standing to challenge the Mandate on religious-freedom grounds, the Circuit precedent of *Natural Res. Def. Council v. SEC*, 1031 (D.C. Cir. 1979) ("*NRDC v. SEC*"), also gives the Gilardis standing in their capacity *as shareholders* of the Freshway Companies to bring this action.

Under *NRDC v. SEC*, shareholders have standing to challenge government action that impacts their ability to exercise their corporate-governance roles to

ensure that the corporation operates in an ethically sound manner:

> All but one appellee have alleged that either they or their members own corporate shares that *they would like to vote in a financially prudent and ethically sound manner*. This allegation was sufficient to establish their standing to bring suit. Their interest was judicially cognizable, personal to them, and was arguably impaired by the lack of equal employment or environmental information. … Moreover, we have no doubt that these appellees, as corporate shareholders concerned about environmental quality, are within the broad zones of interest of both NEPA and the securities acts.

*Natural Res. Def. Council v. SEC*, 1031, 1042 (D.C. Cir. 1979) (footnotes omitted, emphasis added).[2] Under *NRDC v. SEC*, therefore, the division that the district court attempts to drive between individual shareholders and the corporations is overstated, which is particularly true for close corporations like the Freshway Companies.

In addition, the Gilardis and the Freshway Companies challenge the Administration's failures to observe procedural safeguards, and "those adversely affected … generally have standing to complain." *FEC v. Akins*, 524 U.S. 11, 25 (1998). Rescission and remand may produce the same result, *id.*, but until that

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[2] *NRDC v. SEC* is not an informational-standing case. One appellee – the Center on Corporate Responsibility – did not own shares, and the Court expressly declined to reach whether that appellee's distinct standing argument could qualify as informational standing because it "involve[d] complex and difficult considerations," and because its standing was unnecessary, given that the share-owning appellees had standing for the reasons set out in the text of the opinion and quoted *supra*, in the text of this brief. *Id.* at 1042 n.6.

happens, the initial injury remains "fairly traceable" to the agency's initial action and redressable by an order striking the initial agency action, *id.*[3] Given the clear procedural violations here, *see* Section II.B, *infra*, coupled with the substantive violation outlined in Sections III-IV, *infra*, the Gilardis have procedural standing, which *relaxes* the standing inquiry's redressability and immediacy requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (procedural-rights plaintiffs "can assert that right without meeting all the normal standards for redressability and immediacy"). Rather than raising the bar for the Gilardis' standing, the district court should have lowered it.

## II. THE MANDATE VIOLATED PROCEDURAL REQUIREMENTS OF BOTH THE CONSTITUTION AND THE APA

The "history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.*, 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Before addressing the substantive merits, *amicus* Eagle Forum first reviews the procedural merits. Although Plaintiffs do not press the issue on appeal, understanding the Mandate's procedural defects will help guide this Court's assessment of not only the Mandate's overall merit but also the underlying jurisdictional issues.

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[3] Although *Akins* did not involve rulemaking violations, its rationale plainly applies to rulemakings. *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (*en banc*).

Although PPACA's authorization for preventive care does not *per se* require that HHS act by notice-and-comment rulemaking, it does not exempt HHS from the APA either, which therefore requires APA compliance. 5 U.S.C. §559. To determine whether agency action qualifies as "legislative rules" or "substantive rules" that require notice-and-comment procedures, this Circuit has noted at least some stable guideposts in an area otherwise "enshrouded in considerable smog": "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *General Motors Corp. v. Ruckelshaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*) (interior quotations omitted). Because it purports to create new duties, the Mandate qualifies as a legislative or substantive rule, and therefore needed to undergo notice-and-comment procedures or meet an exception.

### A. Promulgating the Mandate Violated the Constitution

Although the typically contested procedural issues concern APA noncompliance, this Court should not forget the underlying *constitutional* issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.,* 517 U.S. 748, 771 (1996). In this action, the Administration purports to rely on the exception to congressional lawmaking that Congress itself has enacted. *See* 5 U.S.C. §553(b). In doing so, an agency cannot "replace the statutory scheme with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.,* 412

F.2d 740, 744 (3d Cir. 1969); *accord U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (APA exceptions "must be narrowly construed").

Failure to follow APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). Thus, if the Administration violated the APA, the Administration's attempt to make law violates not only the APA but also the Constitution.

### B. Promulgating the Mandate Violated the APA

Unless certain exceptions apply, agencies must undertake notice-and-comment rulemaking in order to issue "legislative rules" under the APA. The parties do not question that the Mandate is a legislative rule. As such, the only potential exception to the APA's rulemaking requirements is where the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B). Although the Administration made weak findings to support bypassing a rulemaking, the Administration also promulgated its Mandate as an "interim final rule." Absent a viable exception to notice-and-comment rulemaking, however, interim final rules (*i.e.*, rules that take effect until the agency gets around to

promulgating lawful rules) are foreign to the APA.

An agency's good-cause finding is, of course, reviewable, and "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dept. of Environmental Protection v. U.S. Environmental Protection Agency,* 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.,* 682 F.3d 87, 94 (D.C. Cir. 2012) (same). The APA's legislative history shows just how narrow these exceptions are:

> "'*Impracticable'* means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. '*Unnecessary'* means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. *'Public interest'* supplements the terms 'impracticable' or 'unnecessary;' it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure."

*Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741, 751 (10th Cir. 1987) (*quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (emphasis in *Hodel).* Under these tests, the Mandate nowhere reaches the required level.

### C. The Mandate's Procedural Defects Deprive It of Deference and Status as Either a Compelling Interest or Even a Public Interest

To prevail in the face of RFRA, the Administration must identify a compelling interest that the Mandate supports. 42 U.S.C. §2000bb-2(b)(1). Under the test for a preliminary injunction, federal courts must weigh the public interest. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). But procedurally infirm rules are a nullity. *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1322-23 (D.C. Cir. 1988). In light of not only the Mandate's procedural defects but also the strong merits arguments against it, Section IV, *infra*, the Mandate is neither a compelling interest nor even a public interest. There is no there there.

## III. THE HHS REGULATIONS BURDEN RELIGION

Plaintiffs and their other supporting *amici curiae* ably brief the right to religious freedom and Plaintiffs' entitlement to relief. Gilardi Br. at 27-52. *Amicus* Eagle Forum focuses on three issues: the relevant religious views on abortifacients; the right of entities like corporations to religious freedom; and the rationality of the Administration's imposing the Mandate to redress sex discrimination.

### A. The Government Lacks the Authority to Set the Contours of Permissible Religious Thought

In statements that unintentionally demonstrate how notice-and-comment rulemaking helps ensure informed decision-making, *Chrysler Corp.,* 441 U.S. at 316 ("Congress made a judgment that … informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons

notice and an opportunity to comment"), the Administration has repeatedly cited 62 Fed. Reg. 8610, 8611 (1997) and 45 C.F.R. §46.202(f) to argue that "federal law" rejects the claim that the Plan B morning-after-pill and Ella week-after-pill are abortifacients. Under these cited authorities, pregnancy begins upon implantation of the embryo to the mother's uterus, not upon fertilization. The Administration's position is both irrelevant and false.

At the outset, conscience rights are defined by the rights holder, not by the Government:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

*Texas v. Johnson,* 491 U.S. 397, 415 (1989) (*quoting West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943)). Religious freedom does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Accordingly, religious freedom neither begins nor ends with government-approved religiosity or lack of it. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (finding unlawful restriction of a faith with animal sacrifice as a principal form of devotion). If *courts* cannot question the merits of one's religious views in religious-freedom cases, the Administration *a*

*fortiori* cannot impose its religious views by administrative fiat or otherwise: "[Plaintiffs] drew a line, and it is not for us to say that the line [they] drew was an unreasonable one." *Thomas*, 450 U.S. at 714. Plaintiffs have every right not to care what the Administration considers the beginning of life.

In any event – and this underscores the need for notice-and-comment rulemaking – the Administration is simply wrong about "federal law." The cited regulation does indeed provide that "pregnancy encompasses the time period from implantation to delivery," 45 C.F.R. §46.202(f), but that entire regulation is confined by the limitation "as used in this subpart" (*i.e.*, 45 C.F.R. pt 46, subpt. B), which is simply inapposite to PPACA. 45 C.F.R. §46.202. More importantly, HHS's predecessor did not reject a fertilization-based definition for all purposes but adopted the implantation-based definition only "to provide an administerable policy" for the specific purpose of obtaining informed consent for participation in federally funded research:

> It was suggested that pregnancy should be defined (i) conceptually to begin at the time of fertilization of the ovum, and (ii) operationally by actual test unless the women has been surgically rendered incapable of pregnancy.
>
> While the Department has no argument with the conceptual definition as proposed above, it sees no way of basing regulations on the concept. Rather in order to provide an administerable policy, the definition must be based on existing medical technology which permits confirmation of pregnancy.

39 Fed. Reg. 30,648, 30,651 (1974). Thus, HHS's predecessor had "no argument" on the merits against recognizing pregnancy at fertilization, but declined for administrative ease and then-current technology. The resulting "administerable policy" merely sets a federal floor for obtaining the informed consent of human subjects in federally funded research. A decision to set an arguable floor (based on 1970s technology) for a limited purpose for administrative expedience obviously cannot translate to the conscience context, where the question is whether individuals or institutions want to avoid participating in activities against their religious beliefs or moral convictions.

Significantly, the enacting Congress expressly held as much by providing that these definitions would not trump religious beliefs and moral convictions under another federal conscience-protection law. S. Rep. No. 93-381 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3655 ("It is the intent of the Committee that guidelines and regulations established by … the Secretary … under the provisions of the Act do not supersede or violate the moral or ethical code adopted by the governing officials of an institution in conformity with the religious beliefs or moral convictions of the institution's sponsoring group"). Thus, "federal law" most emphatically does not define life and abortion as the Administration argues.

Quite the contrary, federal law uses a fertilization-based definition at other times: "Child means an individual under the age of 19 including the period from

conception to birth." 42 C.F.R. §457.10; *see also* 67 Fed. Reg. 61,956, 61,963-64 (2002) (finding it unnecessary to define "conception" as "fertilization" because HHS did "not generally believe there is any confusion about the term 'conception'"). Indeed, the fertilization-based definition has a stronger historical, legal, and scientific foundation:

> All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion.

U.S. Dep't of Health, Education & Welfare, Public Health Service Leaflet No. 1066, 27 (1963). Scientifically, the pre-implantation communications or "cross talk" between the mother and the pre-implantation embryo establish life before implantation, *see, e.g.*, Eytan R. Barnea, Young J. Choi & Paul C. Leavis, "*Embryo-Maternal Signaling Prior to Implantation*," 4 EARLY PREGNANCY: BIOLOGY & MEDICINE, 166-75 (July 2000) ("embryo derived signaling … takes place prior to implantation"); B.C. Paria, J. Reese, S.K. Das, & S.K. Dey, "*Deciphering the cross-talk of implantation: advances and challenges*," SCIENCE 2185, 2186 (June 21, 2002); R. Michael Roberts, Sancai Xie & Nagappan Mathialagan, "*Maternal Recognition of Pregnancy*," 54 BIOLOGY OF REPRODUCTION, 294-302 (1996), as do the embryology texts. *See, e.g.*, Keith L. Moore & T.V.N. Persaud, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 15 (8th ed. 2008) ("Human development begins at fertilization when

a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual."). This Court should have no difficulty in rejecting the Administration's ahistorical and unscientific legerdemain. This Nation was founded on principles of freedom of religion, not government-defined orthodoxy.

### B. Corporations Can Assert Claims of Religious Freedom

The Administration's argument that corporations cannot assert free-exercise claims is plainly misplaced. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations"). "That [plaintiff] is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983." *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1057 (9th Cir. 2002) (quoting *Advocates for the Arts v. Thomson,* 532 F.2d 792, 794 (1st Cir. 1976), alteration in *RK Ventures*); *cf. First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 780 n.15 (1978) ("settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment"). "The fundamental concept of liberty embodied in th[e Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment[, which] declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Nothing *per se* prohibits corporations from asserting religious freedom.

While it is true that the Supreme Court has rejected the Article III standing of a large and diverse entity by "require[ing] the participation of individual members" where "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion," *Harris v. McRae,* 448 U.S. 297, 321 (1980), that reasoning does not extend to close corporations such as the Freshway Companies that are, in essence, family businesses. *E.E.O.C. v. Townley Engineering & Mfg. Co.,* 859 F.2d 610, 619-20 (9th Cir. 1988) (citing *Tony & Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 303 n.26 (1985)). Thus, even without RFRA, the Gilardis and the Freshway Companies could challenge the Mandate.

If anything, RFRA *extends* the ability of a corporation and its owners to assert religious-freedom rights. RFRA adopts 42 U.S.C. §2000cc-5 as its definition of the "exercise of religion," 42 U.S.C. §2000bb-2, and that definition extends to "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. §2000cc-5(7)(A) (emphasis added), and even includes the use of real property. 42 U.S.C. §2000cc-5(7)(B). While the Freshway Companies are not real property, it is nonetheless a form of property that the Gilardis use in the exercise of their Catholic faith. Because the RFRA definition

extends broadly to *any* exercise of religion,[4] it plainly would be broad enough to include the Gilardis' use of the Freshway Companies to live their lives according to their faith.[5]

### C. The Mandate Does Not Redress Sex Discrimination

In related litigation, the Administration and its *amici* repeatedly have argued that the Mandate redresses sex discrimination, thereby providing a compelling interest that could trump religious freedom. To the contrary, discrimination because of pregnancy or the ability to get pregnant qualifies as sex discrimination only in the employment context, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983), and only there because the Pregnancy Discrimination Act expressly said so. *Id.* Outside of that context, disparate treatment of a potentially pregnant person because of sex-neutral criteria (*e.g.*, opposition to abortion) is not discrimination *because of that person's sex. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993). "While it is true

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[4] "[R]ead naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (interior quotations omitted).

[5] As indicated in Section I, *supra*, the entire divide between the Gilardis' roles as individuals and the Freshway Companies roles as corporations is overstated, given that the Gilardis' status as shareholders gives them standing to ensure that the Freshway Companies operate ethically. Although the Administration likely has its own definition of ethics, that is irrelevant because standing is measured by and under *the plaintiffs'* merits views. *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003).

… that only women can become pregnant, it does not follow that every … classification concerning pregnancy is a sex-based classification." *Id.* (interior quotations omitted); *McRae*, 448 U.S. at 322. Instead, discrimination requires that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part *because of*, not merely *in spite of*, its adverse effects upon an identifiable group." *Bray*, 506 U.S. at 271-72 (interior quotations omitted, emphasis added); *In re Union Pacific R.R. Employment Practices Litig.*, 479 F.3d 936, 944-45 (8th Cir. 2007) (no sex discrimination if health plans deny contraceptive coverage to both women and men). Because it seeks to solve a non-existent problem, the Mandate is arbitrary and capricious – not compelling – as a government interest.

## IV. THE MANDATE EXCEEDS HHS'S AUTHORITY

With the foregoing background, *amicus* Eagle Forum now demonstrates that the Mandate exceeds HHS's authority under PPACA. Alternatively, if Congress intended to provide the authority that the Administration claims, then PPACA violates the non-delegation doctrine.

### A. The Mandate Violates the Non-Delegation Doctrine

As signaled in Section II.A, *supra*, with respect to agencies' rulemaking authority, the nondelegation doctrine derives from the constitutional command that "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, §1. Under this doctrine, Congress cannot abdicate or to

transfer to others the essential legislative functions with which it is thus vested; Congress can, however, delegate legislative authority, so long as it provides "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *U.S. v. Mistretta*, 488 U.S. 361, 372 (1989). Here, PPACA provides no intelligible principle in 42 U.S.C. §300gg-13(4) to guide the Administration. The statute – under the Administration's view of it – is particularly standardless given the presumption against preemption that would apply, if Congress had acted alone. *See* Section IV.B, *infra*. The Constitution does not allow Congress to write the Administration a blank check to circumvent state authority.

### B. The Presumption Against Preemption Applies

As explained in Section IV.B.1, *infra*, the fields of insurance generally, preventive-care coverage specifically, and conscience exceptions all are fields that the states occupied before PPACA's and the Administration's intrusions. In essence, then, the Administration takes the position that its Mandate preempts state law. But federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995). Accordingly, under the Supreme Court's preemption

analysis, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

When this presumption applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. Significantly, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). As explained in the next two sections, the presumption against preemption applies here and denies the Administration's resort to its expansive interpretation of the statutory phrase "preventive care" in health insurance.

### 1. PPACA Intrudes into State-Occupied Fields

Although the federal government has been in the field of medical insurance under the Spending Clause for federal insurance programs paid for by the United States, PPACA represents a further federal expansion into several fields and sub-

fields already occupied by the states, particularly private health insurance *not* funded under the Spending Clause. First, of course, the states long have regulated health insurance generally. *See Travelers Insurance*, 514 U.S. at 654. Second, as part of that regulation, states have regulated the types of mandatory preventive care that insurance policies in that state must cover and the terms on which they must cover them. *See, e.g.*, ALA. CODE §16-25A-1(8); ARK. CODE. ANN. §23-79-141; COLO. REV. STAT. §10-16-104(11)(b)-(c), (18); IND. CODE §27-8-24.2-10; KY. REV. STAT. §205.6485; MASS. GEN. LAWS ch. 175 §47C; MICH. COMP. LAWS ANN. §500.3501(b)(ix); MICH. ADMIN. CODE r. 325.6125(d)(ii); MINN. STAT. §§62J.01, 62J.04, 62A.047, 62D.095(5); 72 PA. CONS. STAT. §3402b.5; W. VA. CODE §16-2J-1. Third, as part of both forms of regulation, states have regulated the extent to which conscience rights apply to health insurance with respect to abortion and contraception. *See, e.g.*, ARIZ. REV. STAT. §20-826(Z); ARK. CODE ANN. §20-16-304; CAL. HEALTH & SAFETY CODE §1367.25; CAL. INS. CODE §10123.196; COLO. REV. STAT. §25-6-102; CONN. GEN. STAT. §§38a-503e(b)(1), 38a-530e(b)(1); FLA. STAT. ANN. §381.0051; HAW. REV. STAT. §431:10A-116.7; LA. REV. STAT. §40:1299.31; 24 ME. REV. STAT. §2332-J; NEB. REV. STAT. §28-338; N.J. STAT. ANN. §17:48-6ee; N.Y. INS. LAW §§3221, 4303; N.C. GEN. STAT. §58-3-178; TENN. CODE ANN. §68-34-104; WYO. STAT. ANN. §42-5-101; *cf.* COLO. REV. STAT. §25-6-101 (public employees); W. VA. CODE §16-2B-4 (same); *see also* Erica S.

Mellick, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL'Y 402, 419, 429-30 (2006).[6] Taken together, PPACA and the Mandate clearly intrude into fields that the states historically have occupied.

### 2. Congress Would Not Cavalierly Preempt State law

As explained, even with obviously preemptive statutes, the presumption against preemption applies to limit the scope of that preemption. *Medtronic*, 518 U.S. at 485. Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* For example, *Santa Fe Elevator*, 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.*

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[6] Although the foregoing authorities predate PPACA, states have continued to add to their regulations in these fields. *See, e.g.*, 2012 Ariz. Legis. Serv. 337 (West); 2012 Kan. Sess. Laws 112, §1, ch. 337, §1; 2012 Mo. Laws 749, §A.

Notwithstanding the literal application of the federal statute, the presumption prevented the federal law's overstepping traditional state regulation in the absence of something much more explicit from Congress.[7]

As explained in the previous section, the states were heavily involved in all relevant aspects of insurance generally, preventive care, and conscience rights. As such, in order to avoid preempting state laws where Congress did not provide clear and manifest evidence of its intent to preempt these state laws, this Court must interpret the statutory phrase "preventive care" narrowly in order to avoid impinging on state-protected rights of conscience as well as discretion on what preventive care to cover. Where this Court can use a narrow interpretation to avoid preemption, *Altria Group,* 555 U.S. at 77, this Court should do so.

### C. The Presumption Against Preemption Answers the Scope of HHS Authority at *Chevron* Step One

At *Chevron* "step one," courts employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron* 467 U.S. at 843 n.9. Only if the attempt to interpret the statute is inconclusive does a federal court go to "*Chevron* step two," where a court would defer to a plausible agency interpretation of an ambiguous statute. *Id.* at 844. As

[7] The presumption against preemption is not limited to states with relevant laws displaced by the federal law in question. Plaintiffs in states without such laws could point to state occupation of the field, in other states, to argue for interpreting federal law narrowly in their states.

indicated in Section II.C, *supra,* however, the Administration is not entitled to deference if the Court finds the Mandate procedurally invalid. Even if the Court remained open to *Chevron* deference generally, that deference would be inappropriate where (as here) the presumption against preemption applies.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

*Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). Although this Court does not have appear to have conclusively addressed the interplay between deferring to the states under the presumption against preemption and deferring to federal agencies under *Chevron, see Albany Engineering Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996), other federal appellate courts have adopted a similar approach in favor of

preemption.[8] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand in this arena than Congress itself.

The presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns. In essence the presumption against preemption is the tool of statutory construction that enables this Court to answer the statutory question at *Chevron* step one, *Chevron* 467 U.S. at 843 n.9, without resort to the Administration's interpretive gloss.

### D. Abortion and Contraception Are Not "Preventive Care"

The foregoing backdrop provides several criteria with which to evaluate the scope of the Administration's authority for mandating "preventive care." First, because the Administration failed to comply with the APA, the Administration's position does not warrant deference. *See* Section II.C, *supra*. Second, because the states already occupied the fields of insurance coverage for preventive care and conscience protections, *see* Section IV.B.1, *supra*, the presumption against preemption applies here to the extent that the Administration attempts to displace

[8] *See, e.g., Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999).

either bodies of state law with uniform federal rules. *See* Section IV.B.2, *supra.* That traditional tool of statutory construction allows this Court to interpret PPACA without resort to the Administration's interpretations. *See* Section IV.C, *supra.* Moreover, even recognizing that PPACA preempted *some* state law, the presumption against preemption applies to limit the *scope* of that federal preemption. *Medtronic,* 518 U.S. at 485. Taking all these interpretive strands together, this Court can take one or both of the two paths: interpret "preventive care" narrowly or interpret PPACA to include conscience protections. Under either path, Plaintiffs will prevail. Moreover, as indicated, the Court can take *both* paths. What these tools of statutory construction prohibit, however, is the Administration's attempt to avoid both paths.[9]

### 1. This Court Should Adopt a Narrowing Construction of PPACA that Excludes Prevention of Pregnancy from the Scope of "Preventive Care"

In order to avoid displacing state regulation of preventive care to the fullest

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[9] On a related note, the Administration's cost-free argument – namely, that the Mandate does not burden religious employers because they need not pay anything for "free coverage" under the Mandate, given that insurers save money because abortion and birth control cost less than childbirth – is pernicious and likely wrong. At the very least, this macabre insurance-pool analysis fails to consider the offsetting long-term benefits that children provide. In any event, forcing someone to procure insurance that violates that person's conscience would violate religious freedom, even if the added *financial* cost were free. The point is that facilitating sinful action – for example, providing insurance coverage used to cause abortions – is morally wrong to Catholics, *see* authorities quoted at p.3, *supra,* which represents the *moral* cost imposed on religious employers like the Gilardis.

extent possible, this Court should interpret the statutory phrase "preventive care" to connote the prevention of *disease,* which would minimize the Mandate's impact on pre-existing state laws on preventive care that are less expansive and less coercive than the Mandate. Viewed in this light, preventing pregnancies would fall outside PPACA's scope because *pregnancy is not a disease.*

The Supreme Court has at least implicitly recognized that pregnancy is not a disease. *Nashville Gas Co. v. Satty,* 434 U.S. 136, 140 (1977) (upholding decision not to treat pregnancy as a disease). Medical advisers at the Food & Drug Administration – the relevant agency within HHS – have recognized as much:

> The oral contraceptives present society with problems unique in the history of human therapeutics. Never will so many people have taken such potent drugs voluntarily over such a protracted period *for an objective other than for control of disease.*

U.S. Food & Drug Admin., Advisory Committee on Obstetrics and Gynecology, Report on the Oral Contraceptives 1 (1966) (emphasis added). Although the Eighth Circuit recently "decline[d] to address whether pregnancy is a 'disease,'" *Union Pacific,* 479 F.3d at 944-45, the Administration's Mandate now forces federal courts to answer that question. In doing so, this Court should reject the Administration's brave new world.

### 2. This Court Should Adopt a Narrowing Construction of PPACA that Subjects "Preventive Care" to a Conscience Exception

In order to avoid displacing state conscience protections to the fullest extent possible, this Court should interpret PPACA to include the fullest conscience protections allowed under state law. *Medtronic*, 518 U.S. at 485. Because such an interpretation would provide a basis for reading PPACA not to preempt state conscience protections, this Court should adopt that interpretation over the Administration's preemptive interpretation. *Altria Group*, 555 U.S. at 77. This path would minimize or even eliminate PPACA's impacts on pre-existing state laws that protect rights of conscience and freedom of religion.

## CONCLUSION

*Amicus* Eagle Forum respectfully submits that the Court should reverse the denial of a preliminary injunction to the Gilardis and the Freshway Companies.

Dated: May 7, 2013

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## CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a), I certify that the foregoing brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,880 words, including footnotes, but excluding this Brief Form Certificate, the Corporate Disclosure Statement, the Statement with Respect to Parties and *Amici,* the Table of Authorities, the Table of Contents, and the Certificate of Service. I have relied on Microsoft Word 2010's word calculation feature for the calculation.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2013, I electronically submitted the foregoing brief *amicus curiae* to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, who are registered CM/ECF users.

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