No.

# IN THE SUPREME COURT OF THE UNITED STATES

**LIBERTY UNIVERSITY, MICHELE G. WADDELL and JOANNE V. MERRILL,**
***Petitioners.***

***v.***

**JACOB J. LEW, KATHLEEN SEBELIUS, SETH D. HARRIS, ERIC H. HOLDER, Jr.,**
***Respondents.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

This case addresses unique and unresolved issues regarding the Patient Protection and Affordable Care Act of 2009 (the "Act"). This Act, with its comprehensive health insurance regulations, has been referred to by the non-partisan Government Accountability Office as "unprecedented." In June 2012, this Court in *NFIB v. Sebelius,* 132 S.Ct. 2566 (2012) resolved three of the issues arising under the Act, finding that (1) the Anti-Injunction Act does not bar the Court's jurisdiction from deciding the Individual Mandate, (2) the Individual Mandate cannot be upheld under the Commerce Clause but can be upheld under the Taxing and Spending Clause, and (3) the Medicaid provision cannot be forced upon an unwilling state.

At the same time that the *NFIB* Petition for a Writ of Certiorari was pending but before it was granted, the instant case, styled *Liberty University v. Geithner*, was also before this Court on the issue of whether the Anti-Injunction Act ("AIA") barred the jurisdiction of the courts. Instead of granting the *Liberty University* petition to address the AIA issue, this Court held the Liberty University petition and ordered that the AIA issue raised in the *Liberty University* case be argued as part of the *NFIB* case.

After issuing the ruling in *NFIB*, the Court initially denied Liberty University's petition. Petitioners filed a petition for rehearing, asking that the Court grant the petition, vacate the Fourth Circuit decision and remand for further proceedings. This Court granted the petition for rehearing and the case was remanded to the Fourth Circuit. Following the Fourth Circuit's consideration and decision on remand, Petitioners now bring this case back before this Court on Petition for Writ of Certiorari to address unresolved issues raised by the Act, namely (1) Whether Congress has the authority to pass the Employer Mandate, (2) Whether the Employer Mandate and its implementing regulations violate the free exercise of religion by forcing religious employers to buy or provide contraceptives and abortion-inducing drugs and devices to their employees despite their sincerely-held religious beliefs that prevent them from doing so, and (3) Whether the Individual Mandate violates the free exercise of religion by forcing certain individuals to make a monthly payment that directly funds abortion contrary to their sincerely-held religious beliefs that prevent them from doing so. The questions before this Court are:

1. Whether Congress has the authority under the Commerce Clause to force employers to buy or provide employees with government

defined health insurance at a rate the government defines as affordable with no option to discontinue coverage without facing excessive punitive fines.

2. Whether Congress has authority under the Taxing and Spending Clause to impose excessive punitive fines on employers enforced by the Departments of Treasury and Labor for failing or refusing to buy or provide government defined health insurance at a rate the government defines as affordable with no option to discontinue coverage without facing excessive punitive fines.

3. Whether the Employer Mandate and its implementing regulations violate the Federal Religious Freedom Restoration Act and the First Amendment Free Exercise of Religion Clause by forcing religious employers to buy or provide contraceptives and abortion-inducing drugs and devices to their employees despite their sincerely-held religious beliefs that prevent them from doing so.

4. Whether the Individual Mandate violates the Federal Religious Freedom Restoration Act and the First Amendment Free Exercise of Religion Clause by forcing certain individuals to make a monthly payment that directly funds abortion contrary to their sincerely-held

religious beliefs that prevent them from doing so.

5. Whether the Fourth Circuit erred when it refused to review the Employer Mandate and its implementing regulations as they existed at the time of the Circuit Court's review, which included regulatory definitions of preventive care services that Congress determined had to be provided as part of minimum essential health insurance coverage, which include, *inter alia*, that employers must buy or provide contraceptives and abortion-inducing drugs and devices to their employees.

## PARTIES

Petitioners are Liberty University, a Virginia non-profit corporation, Michele G. Waddell and Joanne V. Merrill.

Respondents are Jacob J. Lew, Secretary of the Treasury of the United States, in his official capacity; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity; Seth D. Harris, Acting Secretary of the United States Department of Labor in his official capacity and Eric H. Holder, Jr., Attorney General of the United States, in his official capacity.

## CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10 percent or more of the corporation's stock.

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## OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals (App. 1a) is reported at 2013 WL 3470532.

## JURISDICTION

The judgment of the Court of Appeals was filed on July 11, 2013. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case addresses Article I, §8, clauses 1 and 3 and the First Amendment of the United States Constitution, selected sections of the Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act"), codified at 26 U.S.C. §§ 36B, 4980D, 4980H, 5000A, 9815 and 42 U.S.C. §§300gg-13, 18022 and 18023; the First Amendment to the U.S. Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb ("RFRA"). The relevant constitutional provisions and statutes are reproduced in the Appendix.

## STATEMENT OF THE CASE

Petitioners seek review of significant constitutional infirmities inherent in several

sections of the Act, including sections 1501 and 1513, which were not before the Court in *NFIB v. Sebelius,* 132 S.Ct. 2566 (2012). While this Court addressed the question of whether the individual insurance mandate in Section 1501 of the Act (26 U.S.C. §5000A) is a proper exercise of Congressional authority under Article I, §8 of the Constitution, it did not address the same question with regard to the employer insurance mandate in Section 1513 (26 U.S.C. §4980H). Nor did this Court address the question of whether the mandates infringe upon religious free exercise rights under the First Amendment and RFRA.

Those questions are squarely presented in this Petition, which seeks review of the Fourth Circuit's decision following remand from this Court. *Liberty University v. Geithner*, 133 S.Ct. 679 (2012) (Mem.). Because the Fourth Circuit's resolution of those questions conflicts with this Court's precedents, including *NFIB*, and because of the constitutional significance of the issues presented by the insurance mandates, this Court should grant review.

Petitioners' challenge to the Act began on the date that it was signed into law, March 23, 2010, when Petitioners filed a Complaint seeking declaratory and injunctive relief under 42 U.S.C. §1983. Plaintiffs alleged, *inter alia*, that the individual and employer mandates exceed Congress' delegated powers under

Article I, §8 of the Constitution, violate Petitioners' rights to free exercise of religion under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b) ("RFRA"), free speech and free association rights under the First Amendment, the Establishment Clause, the Fifth Amendment Equal Protection Clause, the Tenth Amendment, the Guarantee Clause, and provisions against direct or capitation taxes.

The district court dismissed the Complaint on the grounds that Petitioners failed to state a claim upon which relief could be granted. *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611 (W.D.Va. 2010). In its initial consideration, the Fourth Circuit did not reach the merits because it concluded that the Anti–Injunction Act ("AIA") deprived the court of jurisdiction. *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. 2011). Petitioners filed a Petition for Writ of Certiorari on the AIA. This Court held the Petition and directed that the AIA be included in the *NFIB* argument.

In *NFIB*, this Court found that the AIA did not bar a challenge to the individual mandate, thereby abrogating the Fourth Circuit's decision. 132 S.Ct. at 2584. The Court initially denied Petitioners' Petition for A Writ of Certiorari, but then granted Petitioners' Petition for Rehearing, granted the Petition, vacated the Fourth Circuit's decision, and remanded the case for further consideration in

light of *NFIB*. *Liberty University v. Geithner*, 133 S.Ct. at 679.

On remand, the Fourth Circuit ordered supplemental briefing on (1) Whether the AIA bars a challenge to the employer mandate; (2) Whether the employer mandate exceeds Congress' powers under the Commerce, Necessary and Proper, and Taxing and Spending Clauses; and (3) Whether and how any developments since the previous briefing in this case may affect the constitutionality of the individual mandate and the employer mandate under the Free Exercise, Establishment, and Equal Protection Clauses. *Liberty University v. Lew,* 2013 WL 3470532, Appendix at 24a. Following briefing and oral argument, the Fourth Circuit found that the AIA did not bar review, that the individual and employer Petitioners had standing, and that the case was ripe for adjudication. (App. at 75a).

Contrary to this Court's finding that the Individual Mandate exceeds Congress' authority under the Commerce Clause, the Fourth Circuit held that the Employer Mandate is a permissible exercise of Congress' Commerce Clause authority. (App. 48a). The Fourth Circuit also found that the Employer Mandate is a permissible exercise of Congress' authority under the Taxing and Spending Clause despite the fact that, unlike the Individual Mandate taxes, the Employer Mandate's multi-level penalties are enormous

and enforced by the Department of Labor ("DOL") as well as the IRS. (App. 57a). The Fourth Circuit dismissed Petitioners' Free Exercise challenge to both the individual and employer mandates with respect to the abortion provisions, finding that the Act is a neutral law of general applicability that does not violate the Free Exercise Clause. (App. 59a). Finally, the Fourth Circuit concluded that the individual and employer mandates did not impose a substantial burden upon Petitioners' exercise of religion in violation of RFRA. (App. 63a). In dismissing the Free Exercise and RFRA claims, the Fourth Circuit rejected Petitioners' request to consider the mandates as they existed at the time of remand, which included implementing regulations defining minimum essential coverage under the mandates to require free access to contraceptives, including abortion-inducing drugs and devices. (App. 75a).

**The Employer Mandate**

The employer insurance mandate ("Employer Mandate") provides that employers of more than 50 "full time" employees must provide government-defined "minimum essential coverage," offering at least "minimum value" of costs and benefits, at a price that is "affordable." 26 U.S.C. §§36B, 4980H, 5000A Employers that fail to comply with any requirement face several levels of penalties. If an employer fails to offer what the

Administration defines as "minimum essential coverage" for any month, then it will be assessed a penalty of $166.67 (1/12 of $2,000) multiplied by the number of full-time employees for that month, less 30 employees. 26 U.S.C. §§4980H(a),(c)(1). This same penalty of $2,000 per employee per year is also applied if employers provide insurance that lacks "essential minimum coverage" dictated by the government, including free contraceptives and abortion drugs and devices. *Id.*

Employers that provide "minimum essential coverage" will still face penalties if the Administration deems that it is "unaffordable." 26 U.S.C. §4980H(b). Employers will be penalized if even one of perhaps thousands of employees obtains an insurance premium tax credit or subsidy because the employee portion of the premium is more than 9.5 percent of the employee's household income (the Administration's definition of "affordable"). 26 U.S.C. §§36B, 4980H(b). The penalty for "unaffordable" coverage begins in 2014 at $250 per month (1/12 of $3,000) multiplied by the number of full-time equivalent employees receiving such subsidies and is adjusted for inflation. 26 U.S.C. §§4980H(b),(c)(5).

In addition to the above excessive fines imposed by the Treasury Department (IRS), the DOL will impose additional excessive fines if an employer's group health plan is found to be

deficient in any of the Administration's requirements (which include the contraceptive and abortifacient mandate). The penalty begins at $100 per day for each employee. 26 U.S.C. §4980D.[1] If the deficiency is not corrected within 30 days following notification then the penalty is $2,500 per day per employee. 26 U.S.C. §4980D(b)(3)(A). If the deficiency is more than "de minimis" (which a refusal to not provide free contraceptives or abortion drugs or devices based on religious objections would be regarded as), then the penalty is increased to $15,000 per employee per day. 26 U.S.C. §4980D(b)(3)(B).

**Minimum Essential Coverage**

To qualify as "minimum essential coverage" under the Act, a policy must cover what the government defines as "essential health benefits." 42 U.S.C. §18022(b). The Act defined "essential health benefits" generally to include, "at a minimum" coverage for emergency treatment, prescriptions, mental health care, laboratory, maternity care, pediatric care, and no-cost preventive care

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[1] Under section 1563 of the Act, codified at 26 U.S.C. §9815, the Act's insurance requirements are included in the conditions with which health insurers, including employers, must comply or face the penalties in 26 U.S.C. §4980D.

services, immunizations, and screenings for infants, children, adolescents and women as described in guidelines supported by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. §18022(b); 42 U.S.C. §300gg-13.

**"Preventive Care" Coverage**

The Act vested the Secretary of Health and Human Services ("HHS") with discretion to further define "preventive care." 42 U.S.C. §18022(b). After Petitioners filed their action, but before the Fourth Circuit considered Petitioners' claims on remand, HHS adopted regulations defining no-cost "preventive care" for women, 45 CFR §147.130, to encompass all FDA-approved "contraceptive" drugs and devices, which include abortion-inducing drugs and devices. *See id.* The "preventive care" coverage must be included in order for a health insurance policy to meet the Act's requirement of "minimum essential coverage."

Petitioner Liberty University is a private non-profit Christian university with sincerely held religious beliefs that prohibit it from playing any part in surgical or chemical abortions, including facilitating, subsidizing, easing, funding, or supporting abortions, or paying for abortion inducing drugs or devices as is required in order for it to comply with the Employer Mandate. (App. 21a). Liberty University employs more than 50 full-time

employees and so will be subject to the Employer Mandate, including the now-defined "essential health benefits" coverage that must include drugs and devices that conflict with its sincerely held religious beliefs. (App. 21a-22a).

**The Abortion Premium**

The Act also provides that government-subsidized health insurance exchanges may include policies that cover elective abortions, and in such cases, to provide for segregated payments to cover those abortions. 42 U.S.C. §18023. If an individual's employer subscribes to an exchange plan that includes abortion coverage, then the individual will be required to make "a separate payment" from his personal funds or payroll deduction directly into an allocation account to be "used exclusively to pay for" elective surgical abortions. 45 CFR §156.280(e) (implementing 42 U.S.C. § 18023).

The Act and regulations do not provide exemptions for enrollees who are opposed to subsidizing surgical abortions. 45 CFR §156.280(e)(2)(i). In addition, enrollees will not receive notice regarding whether an exchange plan covers surgical abortions and about the separate payments except as part of the summary of benefits at the time of initial enrollment, and even then the notice will describe only the total premium payments. 45 C.F.R. §156.280(f). Consequently, regardless of

whether an individual obtains insurance directly from an exchange or through an employer, he will effectively not be permitted to avoid subsidizing elective surgical abortions. *Id.*

Petitioners Michele Waddell and Joanne Merrill have sincerely held religious beliefs that bar them from playing any part in surgical or chemical abortions, including facilitating, subsidizing, easing, funding, or supporting abortions, including as is required under the Act through the payment of separate premiums for surgical abortions in exchange plans or subsidizing chemical abortions in employer plans. (App. 22a).

Since the insurance mandates affect the religious free exercise rights of employer Liberty University and individuals Waddell and Merrill, they present a conflict between permissible exercises of Congress' enumerated powers and rights protected by the First Amendment and RFRA. As Justice Ginsburg cautioned in *NFIB*, "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly . . . interfered with the free exercise of religion." 132 S.Ct. at 2624 (Ginsburg, J., concurring in part). With that situation presented squarely by the Fourth Circuit's decision, Petitioners respectfully request that the Court grant review.

## REASONS FOR GRANTING THE PETITION

Petitioners ask this Court to grant their Petition and to resolve the significant conflicts between the Fourth Circuit's decision, precedents in this Court and other courts of appeal and to determine the critically important constitutional issues underlying this challenge.

### I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S RULING THAT THE EMPLOYER MANDATE IS AUTHORIZED UNDER THE COMMERCE CLAUSE AND THIS COURT'S PRECEDENTS.

In *NFIB,* this Court found that Congress lacks authority under the Commerce Clause for force individuals to buy an unwanted product, namely health insurance. *NFIB v. Sebelius,* 132 S.Ct. 2566, 2591 (2012). The same is true of the Employer Mandate, which, like the Individual Mandate, compels employers not only to purchase insurance, but to purchase a particular insurance product at a particular price or face excessive penalties. 26 U.S.C. §§36B, 4980D(b), 4980H(b). Just as the attempt to force individuals to purchase a particular product exceeded the limits of the Commerce

Clause, *NFIB*, 132 S.Ct. at 2591, so too does Congress' attempt to force employers to purchase the same unwanted product.

Nevertheless, the Fourth Circuit held that the Employer Mandate does not exceed Congress' Commerce Clause authority. (App. 48a). The court attempted to justify its departure from *NFIB* by redefining the relevant market for purposes of Commerce Clause analysis, redefining the nature of the insurance mandate vis-à-vis employers, and redefining employee compensation so as to place the Employer Mandate in the realm of wage and hour laws. (App. 35a-48a). None of the court's attempts to redefine the Employer Mandate successfully differentiates it from the Individual Mandate found to exceed Congress' Commerce Clause authority. More importantly, the court's attempted redefinitions conflict with this Court's precedents, emphasizing the need for this Court's review.

### A. The Fourth Circuit's Opinion That Congress Can Force Employers To Buy Or Provide An Unwanted Product Conflicts With *NFIB*.

Just as Congress cannot force individuals to purchase an unwanted product, *see NFIB*, 132 S.Ct. at 2591, so too Congress cannot force employers to purchase an unwanted product.

As is true about the Individual Mandate, in the Employer Mandate Congress is seeking to use its Commerce Clause power to compel employers to act as the Government would have them act. *Id.* at 2589. The Employer Mandate does not merely require that employers buy or provide health insurance for their employees, but goes much further to require that employers purchase a particular type of health insurance product at a particular price. 26 U.S.C. §§36B, 4980D(b), 4980H(b). And, because the penalties are so high, employers are forced into the market and prevented from leaving.

Only health insurance that meets the Administration's definition of "essential health benefits" and which the Administration determines is sufficiently "affordable" will satisfy the Employer Mandate. 26 U.S.C. §§36B, 4980H(b). Consequently, as is true of the Individual Mandate, the Employer Mandate is not regulating existing commercial activity, but is compelling employers to act as the Government dictates. This exceeds Congress' power under the Commerce Clause. *NFIB*, 132 S.Ct. at 2591. Unlike the Individual Mandate, the penalty for not providing insurance under the Employer Mandate is not essentially the equivalent of providing insurance.

Nevertheless, the Fourth Circuit concluded that the Employer Mandate does not

"run afoul of *NFIB*'s teachings," but is merely an extension of Congress' existing regulation of employers. (App. 48a). The Fourth Circuit reached that conclusion by asserting that the Employer Mandate does not, in fact, require employers to "purchase an unwanted product" because employers are free to self-insure. (App. 43a). The Fourth Circuit creates a false dichotomy between "purchased insurance" and "self insurance" to attempt to differentiate between the forced purchase in the Individual Mandate which was invalidated in *NFIB* and the forced purchase in the Employer Mandate. In fact, whether an employer is compelled to buy government-defined insurance through a third party or purchase it directly is irrelevant. Either way, the employer, like the individual, is compelled to purchase an unwanted government-defined insurance product at a government-defined price. 26 U.S.C. §§36B, 4980D(b), 4980H(b). Congress lacks authority to force an employer to purchase an unwanted product in the same way that it lacks authority to force an individual to do so. *NFIB,* 132 S.Ct. at 2591.

The Fourth Circuit also attempted to buoy its conclusion that the Employer Mandate does not "run afoul" of *NFIB* by mischaracterizing the relevant market as the "market for labor" instead of the market for health insurance that meets Government requirements. (App. 43a). The Fourth Circuit

claims that the Employer Mandate does not compel employers to enter into commerce because all employers are "in the market for labor" and therefore are already engaged in commercial activity. (App. 43a). According to the Fourth Circuit, once an employer decides to hire employees for its business, it subjects itself to governmental regulation of all aspects of its operation, including whether it will offer health insurance and what that insurance will cover and cost. (App. 43a). That conclusion "runs afoul" of *NFIB*, and in particular, this Court's finding that the Commerce Clause does not give Congress a general license "to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions." *NFIB*, 132 S.Ct. at 2591. Individuals use health care but Congress lacks authority to force them to buy health insurance. Individuals are consumers, but Congress cannot force them to consume health insurance. Employers hire employees but Congress lacks authority to force them to provide those employees with health insurance or severely fine them for refusing to do so. For the Fourth Circuit to conclude otherwise conflicts with *NFIB*.

The Fourth Circuit further departed from established precedent when it likened employee health insurance to lodging and restaurants as essential to interstate travel and commerce. (App. 45a). According to the Fourth Circuit, the

Employer Mandate substantially affects workers' interstate mobility because employees who are worried about losing health insurance coverage if they change jobs will be hesitant to pursue other employment opportunities. (App. 46a-47a). Therefore, the court said, health insurance affects interstate commerce in the same way as hotels and restaurants were found to affect it in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964).

In fact, this Court's decisions in *Heart of Atlanta* and *Katzenbach* do not support the Fourth Circuit's conclusion. In *Heart of Atlanta* and *Katzenbach*, there was empirical evidence that African-Americans' ability to travel interstate was adversely affected by hotel and restaurant policies that denied service to African-Americans. *Heart of Atlanta*, 379 U.S at 252-253; *Katzenbach*, 379 U.S. at 304-05. By contrast, here, there is no empirical evidence that employees have been prevented from moving interstate to accept job opportunities because of the existence and extent of health insurance coverage. Instead, the Fourth Circuit relied upon a string of assumptions to cobble together a comparison between food and lodging and employee health insurance coverage that is wholly unsupported by the evidence or this Court's precedent.

This Court has rejected similar attempts to string together a series of assumptions in order to create an effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). In *Lopez*, this Court rejected as too tenuous the government's argument that possessing a handgun near a school substantially affected interstate commerce because guns may lead to violent crime, which in turn has substantial costs and reduces the willingness of individuals to travel to areas perceived to be unsafe. 514 U.S. at 564. Similarly, in *Morrison*, this Court rejected the argument that gender-motivated violence affects interstate commerce

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

529 U.S. at 615. The Fourth Circuit's adoption of similar arguments to conclude that the Employer Mandate is valid under the

Commerce Clause contradicts established precedent and should be reviewed by this Court.

### B. The Fourth Circuit's Decision That Congress Can Force Employers To Purchase Or Provide An Unwanted Product Conflicts With This Court's Commerce Clause Precedents.

The Fourth Circuit rested its conclusion that the Employer Mandate is a proper exercise of Congress' Commerce Clause power on the premise that forcing employers to purchase an unwanted product is a natural extension of Congress' regulation of working conditions. (App. 42a-43a). "[W]e find that the employer mandate is . . . is simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." (App. 42a).

In fact, however, the Employer Mandate is an impermissible expansion of congressional authority well beyond the limited regulation of minimum wages and maximum hours upheld by this Court in *United States v. Darby*, 312 U.S. 100 (1941) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Fourth Circuit cited *Darby* and *NLRB* as support for its proposition that the Employer Mandate is

just another wage and hour regulation. (App. 44a-45a). However, this holding conflicts with this Court's explicit statements in *Darby* and *NLRB* that they were **not** to be read to allow the government to force *agreements* between employers and employees or require the provision of certain *benefits*. *Darby*, 312 U.S. at 115; *NLRB,* 301 U.S. at 45. This Court held that the National Labor Relations Act "does not compel agreements between employers and employees. It does not compel any agreement whatever." *NLRB*, 301 U.S. at 45. Similarly, the Fair Labor Standards Act upheld in *Darby* did not intrude into all aspects of the employment relationship nor dictate what *benefits* must be provided to employees as does the Employer Mandate. *Darby*, 312 U.S. at 115. The conflict between the Fourth Circuit and this Court's precedents should be resolved.

The Employer Mandate also exceeds Congress' authority to regulate employers who voluntarily agree to provide certain employee benefits. *Regulations such as ERISA and COBRA only apply if employers have voluntarily agreed to provide employee benefits and no longer apply once employers discontinue the benefits*. *See* Public L. No. 99-272, § 10001 (1986), 100 Stat. 82. "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Black & Decker*

*Disability Plan v. Nord*, 538 U.S. 822, 833 (2003).

By contrast, the Employer Mandate not only requires employers to establish employee benefits, *i.e.,* health insurance, and what those benefits must entail, but it also dictates how much the employer can charge the employee. 26 U.S.C. §§36B, 4980D(b), 4980H(b). Furthermore, the Employer Mandate does not permit employers to *discontinue* providing the benefits and thereby avoid the strictures of the law. Employers must either pay for health insurance (and perhaps even then pay penalties) or pay substantial penalties if they fail to provide health insurance. *Id.* The only way that an employer can escape the provisions of the Employer Mandate is to never have more than 49 employees or go out of business. *Id.* Because the Employer Mandate far exceeds the boundaries established by this Court's precedents, the Fourth Circuit's determination that that the mandate is constitutional should be reviewed by this Court.

## II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S FINDING THAT THE EMPLOYER MANDATE IS AUTHORIZED UNDER THE TAXING AND SPENDING CLAUSE AND THIS COURT'S PRECEDENTS.

While finding that the Individual Mandate exceeded Congress' authority under the Commerce Clause, this Court found that it was a valid tax by characterizing it as a payment for not buying health insurance instead of a command to purchase a product. *NFIB v. Sebelius*, 132 S.Ct. 2566, 2593-2594 (2012). This Court also found that the practical characteristics of the Individual Mandate meant that it did not cross the line between a permissible tax and an impermissible penalty. *Id.* at 2600. Neither of those propositions is true regarding the Employer Mandate, which imposes substantially different penalties upon employers and which has all the characteristics of a punitive penalty under *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

The Fourth Circuit failed to address the constitutionally significant differences between the Individual Mandate and Employer Mandate when it concluded that the Employer Mandate is a valid tax under *NFIB* and *Drexel Furniture*. Because the court's conclusion

conflicts with this Court's precedents, this Court should grant review to resolve the conflict and address this issue of pressing national interest.

### A. The Fourth Circuit's Conclusion That The Employer Mandate Is A Valid Tax Conflicts with *NFIB*.

Critical to this Court's conclusion that the Individual Mandate is a valid tax, and missing from the Employer Mandate, is the finding that the penalty under the Individual Mandate is small in comparison to the cost of paying for health insurance. *NFIB*, 132 S.Ct. at 2594. This Court upheld the Administration's characterization of the Individual Mandate as "establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS." *Id.*

This Court went on to find that under the Individual Mandate, 26 U.S.C. §5000A, it "may often be a reasonable financial decision to make the payment rather than purchase insurance…." *Id.* at 2596. Indeed, the payment will be phased in over time, beginning at $95 per person in 2014, $325 in 2015 and $695 in 2016, and thereafter indexed according to inflation, compared to perhaps several thousand dollars for a government-defined

health insurance policy. *See* 26 U.S.C. §5000A(c)(3).

However, unlike the penalty under the Individual Mandate, the penalty under the Employer Mandate will be as much or more than insurance. 26 U.S.C. §§36B, 4980H. The Employer Mandate establishes multiple levels of penalties not limited to merely failing to purchase insurance. 26 U.S.C. §4980H. An employer who fails to provide health insurance for its employees will be penalized at the rate of $2,000 per year per "full-time" employee (less 30). 26 U.S.C. §4980H(c)(4). "Full-time" is defined as 30-hours per week. *Id.* In addition, employees working fewer than 30 hours per week are aggregated and their time divided by 120 to create "full-time equivalent employees" for each month who are included for purposes of determining whether an employer meets the threshold for the insurance mandate. 26 U.S.C. §4980H(c)(2)(E). For example, using the number of 3,900 full-time employees at Liberty University, as assumed by the Fourth Circuit (App. 21a),[2] the penalty would be $7.8 million, and will be more depending upon the actual number of employees when the mandate becomes effective and how the Government

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[2] The number of employees now is substantially higher than the number used by the Fourth Circuit because of Liberty University's substantial growth.

categorizes the university's adjunct faculty. Furthermore, even if an employer provides health insurance it will still be subject to penalties if its coverage does not meet the "minimum essential coverage" or affordability requirements. 26 U.S.C. §§4980D, 4980H(a),(b). Failure to meet coverage standards will result in an IRS penalty of $2,000 per employee per year under section 4980H(a) and up to $15,000 per employee per day in DOL penalties under Section 4980D. Failure to meet affordability standards results in a penalty of $3,000 per year per applicable employee under section 4980H(b).

Consequently, while an individual could comply with the Individual Mandate by making a "reasonable financial decision" to pay the minimal penalty under 26 U.S.C. §5000A instead of buying insurance, *NFIB*, 132 S.Ct. at 2596, an employer cannot do so under 26 U.S.C. §§4980D and 4980H. An employer who complies with the condition of purchasing health insurance for employees will still face even higher penalties, including penalties of $100 to as much as $15,000 per employee per day, if it does not meet Government standards for coverage and cost. 26 U.S.C. §§4980D and 4980H. These additional levels of penalties that apply even when employers provide health insurance illustrate that the Employer Mandate is not analogous to the Individual Mandate that this Court found to be a valid

tax. *NFIB*, 132 S.Ct. at 2596. The Fourth Circuit's contrary conclusion conflicts with *NFIB* and should be reviewed by this Court.

### B. The Fourth Circuit's Conclusion That The Employer Mandate Is A Valid Tax Conflicts With This Court's Precedents Differentiating Between Taxes And Penalties.

The significant differences between the penalty assessed under the Individual Mandate and the multiple penalties imposed under the Employer Mandate mean the Employer Mandate has crossed "the point at which an exaction becomes so punitive that the taxing power does not authorize it." *NFIB*, 132 S.Ct. at 2600. The attributes of the penalty in the Individual Mandate, when analyzed under the factors in *Drexel Furniture,* led to the conclusion that the payment was a permissible tax. *Id.* However, the significantly different attributes of the multiple penalties under the Employer Mandate lead to the opposite conclusion, *i.e.*, that the Employer Mandate is impermissible, as was the penalty in *Drexel Furniture*, 259 U.S. at 37.

The Fourth Circuit contravened both *NFIB* and *Drexel Furniture* when it concluded that the Employer Mandate, like the Individual Mandate, is distinguishable from the penalty in

in *Drexel Furniture*. (App. 54a-56a). Inherent in the Fourth Circuit's contradictory holding is its failure to acknowledge how the multiple penalties in the Employer Mandate differ significantly from the single small penalty in the Individual Mandate. When those differences are properly accounted for, application of the *Drexel Furniture* factors requires a finding that the Employer Mandate exceeds Congress' authority under the Taxing and Spending Clause.

First, the payment under the Individual Mandate "will be far less than the price of insurance, and, by statute, it can never be more," and therefore is unlike "the prohibitory financial punishment in *Drexel Furniture*, 259 U.S. at 37." *NFIB*, 132 S.Ct. at 2596. By contrast, the multi-level penalty structure in the Employer Mandate is not merely an in-lieu payment for not purchasing health insurance. 26 U.S.C. §4980H. Instead, like the punitive penalty in *Drexel Furniture*, the multiple penalties under the Employer Mandate punish even employers who purchase health insurance if they fail to purchase government-approved coverage or if the coverage is not what the government regards as affordable. *Id.* Furthermore, employers are subject to additional *daily* fines of $100 to $15,000 per employee if they fail to meet government standards. 26 U.S.C. §4980D.

Second, these latter fines also contain the scienter requirement that is absent in the Individual Mandate but was present in *Drexel Furniture*. Under 26 U.S.C. §4980D(b)(3), the daily fines are increased from $100 to $2,500 if the deficiency goes uncorrected following an examination. If the deficiency in coverage is found to be more than "de minimis," then the penalty can increase from $2,500 to $15,000 per day. 26 U.S.C. §4980D(b)(3). Refusal to provide free contraceptives and abortion drugs and devices which conflict with sincerely held religious beliefs would fall in this category. Furthermore, the penalties under 26 U.S.C. §4980H include a scienter requirement since they punish employers who are aware of the law and intentionally choose to either not purchase insurance or not purchase insurance that contains the government required provisions. As discussed below, employers that have religious objections to certain prescribed coverage and intentionally purchase coverage that does not provide contraceptives or abortion drugs or devices will be fined for their intentional, religiously-motivated actions. 26 U.S.C. §4980H.

Third, Liberty University is a non-profit, tax-exempt educational institution under 26 U.S.C. §501(c)(3). The Act does not include provisions to waive tax exempt status for payment of the Employer Mandate penalties, so Congress cannot impose payments as taxes

upon employers such as Liberty University that are exempt from taxation.

Finally, as was true with the penalty in *Drexel Furniture* but untrue with the Individual Mandate, the penalties under the Employer Mandate are enforced by the *Department of Labor* as well as the IRS. The Act's requirements for employer-provided health insurance were incorporated by reference into ERISA. 29 U.S.C. §1185d. The DOL enforces ERISA and is empowered to seek "appropriate relief" when an employer violates its provisions. 29 U.S.C. §1132(a)(5). Therefore, an employer that fails to provide "affordable" health insurance offering "essential health benefits" will be subject not only to an IRS penalty, but also to penalties and punishment by the DOL. This places the Employer Mandate squarely within the realm of impermissible penalties as described in *Drexel Furniture,* 259 U.S. at 37.

The Fourth Circuit's conclusion that the Employer Mandate, like the Individual Mandate, is a permissible tax, conflicts with established precedent in *NFIB* and *Drexel Furniture*. This Court should grant review to resolve the conflict.

## III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S FINDING THAT THE INSURANCE MANDATES ARE VALID NEUTRAL, GENERALLY APPLICABLE LAWS AND THIS COURT'S PRECEDENTS.

Despite the presence of religion-specific individualized exemptions in the text of the Act, the Fourth Circuit concluded that the Act is a neutral law of general applicability that does not violate the Free Exercise Clause. (App. 59a). That conclusion not only contravenes the text of the Act, but also this Court's precedents defining neutral and generally applicable laws. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Emp't. Div., Dep't. of Human Res. v. Smith*, 494 U.S. 872, 879 (1990).

### A. The Fourth Circuit's Conclusion That The Act Is Neutral Conflicts With *Lukumi*.

The Fourth Circuit contravened this Court's precedent in *Lukumi* when it dismissed

Petitioners' First Amendment challenge on the grounds that the Act is a valid, neutral law. (App. 59a). The Fourth Circuit categorically denied Petitioners' assertion that the Act effects a "religious gerrymander" under *Lukumi* (App. 59a). In fact, the particularized religiously-based exemptions in the Act present just the kind of religious gerrymanders that this Court warned against in *Lukumi*, 508 U.S. at 534. The Fourth Circuit's assertion that the Act "does no such thing," (App. 59a), contradicts that precedent.

"The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534. "'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Id.* (citing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Consequently, even though the ordinance at issue in *Lukumi* did not specifically mention "religious sacrifices," the circumstances surrounding its adoption showed unmistakably that it was not neutral. *Id.* at 542.

Contrary to the Fourth Circuit's conclusion, the same is true with the Act. In fact, the lack of neutrality is even clearer in the Act because, unlike the ordinance in *Lukumi,* it is not facially neutral. 26 U.S.C. §5000A. The Act explicitly grants preferential treatment to

particular religious adherents while subjecting others to the strictures of the Individual Mandate. *Id.* Two groups of religious adherents are exempt from the mandate, those who qualify under a narrowly defined religious conscience exemption and equally narrow "health care sharing ministry" exemption. 26 U.S.C. §5000A(d)(2). The "religious conscience" exemption provides that only individuals who are members of religious sects that have been in existence since December 31, 1950, have tenets against participation in government support programs, and have demonstrated that they provide care for dependent members are exempt. 26 U.S.C. §5000A(d)(2) (citing 26 U.S.C. §1402). The "health care sharing ministry exemption" provides that only people who are members of non-profit organizations in existence continuously since December 31, 1999, which share a common set of ethical or religious beliefs and have continuously shared medical expenses among members in accordance with those beliefs are exempt. *Id.*

On its face, the Act creates governmentally defined categories of exemptions that differentiate between religious adherents, granting some an exemption from the insurance mandate but leaving the rest subject to its requirements. *Id.* Those who belong to the preferred sects or health sharing ministries described in the exemptions will not suffer the penalties and other liabilities under

the Act. However, others, like Petitioners, who have similar religious beliefs but are not part of the preferred groups, will suffer those liabilities. *Id.* This is precisely the type of "religious gerrymandering" condemned in *Lukumi*, 508 U.S. at 534. The Fourth Circuit's conclusion that the Act is neutral (App. 59a) contradicts precedent and should be reviewed by this Court.

### B. The Fourth Circuit's Conclusion That The Act Is Generally Applicable Conflicts With *Lukumi* And *Smith*.

Similarly, the Fourth Circuit's conclusion that the Act is generally applicable and therefore does not violate the First Amendment contradicts *Lukumi,* 508 U.S. at 534, and *Smith*, 494 U.S. at 879. In *Lukumi* and *Smith* this Court held that a law is not generally applicable if it contains individualized exemptions. *Lukumi*, 508 U.S. at 537-538; *Smith*, 494 U.S. at 884. If, as is true with the Act, a law contains individualized exemptions then the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. A law that subjects religious adherents to differential treatment is not generally applicable. *Id., Lukumi*, 508 U.S. at 538.

Contrary to the Fourth Circuit's conclusion, that is precisely what the Act does. Members of preferred religious sects and health care sharing ministries receive exemptions, but other religious adherents do not. 26 U.S.C. §5000A(d). Also, members of Indian tribes and certain low-income people are granted exemptions from the Individual Mandate, but non-preferred religious adherents are not. 26 U.S.C. §5000A(d). Similarly, employers with fewer than 50 full-time employees or that have policies considered "grandfathered" are explicitly exempted from parts of the Employer Mandate. 26 U.S.C. §4980H(c)(2)(A). In addition, the Administration has exempted more than 1,000 employers covering millions of employees from certain provisions of the Act under discretionary authority Congress granted to the Administration in the Act.[3] These thousands of individualized exemptions mean that the Act is not "generally applicable." *Smith*, 494 U.S. at 884. The Fourth Circuit's contrary conclusion conflicts with this Court's precedents and should be reviewed.

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[3] *See* http://www.cms.gov/CCIIO/Resources/Files/approved_applications_for_waiver.html, (last visited August 15, 2013) (listing waivers granted to 1,231 employers as of January 2012).

## IV. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S FINDING THAT THE INSURANCE MANDATES DO NOT SUBSTANTIALLY BURDEN RELIGIOUS EXERCISE IN VIOLATION OF RFRA AND THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

The Fourth Circuit's conclusion that Plaintiffs cannot show that the mandates substantially burden religious exercise (App. 60a-61a) contradicts this Court's precedents which establish that laws which force people to choose between religious beliefs and government benefits create a substantial burden upon religious belief. *Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal*, 546 U.S. 418 (2006); *Thomas v. Review Bd. of Ind. Emp't. Sec. Div.*, 450 U.S. 707 (1981).

The Fourth Circuit's ruling also conflicts with decisions in other circuits, including the Tenth Circuit, which found that the Hobson's choice placed on religious employers by the Employer Mandate as fully defined creates a substantial burden under RFRA as a matter of law. *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3216103 (10th Cir. 2013) (en banc). *See also, Grote v. Sebelius,* 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, 2012 WL 6757353 (7th Cir. 2012); *Annex Med., Inc. v. Sebelius*, 2013

WL 1276025 (8th Cir. 2013) (granting injunctions pending appeal on RFRA challenges to portions of Employer Mandate). The Tenth Circuit's finding, in particular, when set against the Fourth Circuit's conclusion that Petitioners cannot possibly assert that the mandates substantially burden religious exercise, demonstrates that there is an inter-circuit conflict that merits review by this Court.

### A. The Fourth Circuit's Ruling That The Mandates Do Not Substantially Burden Religious Exercise Conflicts With This Court's Precedents.

The Fourth Circuit's assertion that "Plaintiffs present no plausible claim that the Act substantially burdens their free exercise of religion, by forcing them to facilitate or support abortion or otherwise," (App. 60a), not only contradicts this Court's precedents, but also misrepresents the terms of the Act.

> The Act specifically provides individuals the option to purchase a plan that covers no abortion services except those for cases of rape or incest, or where the life of the mother would be endangered. *See* 42 U.S.C. §18054(a)(6)

> (requiring that at least one plan on each exchange exclude non-excepted abortions from coverage). The Act also does nothing to prevent employers from providing such a plan. Furthermore, the Act allows an individual to obtain, and an employer to offer, a plan that covers no abortion services at all, not even excepted services. *See* 42 U.S.C. §18023(b)(1)(A)(i).

(App. 60a-61a). Based upon that paraphrase of 42 U.S.C. §18023, the Fourth Circuit concluded that there is not even a "plausible" claim that the mandates could substantially burden religious exercise. (App. 60a-61a).

In fact, Section 18023 does not protect religious rights to the extent claimed by the court. There is no guarantee that those like Petitioners whose sincerely held religious beliefs prevent them from subsidizing or facilitating surgical abortions will be able to avoid such subsidies. 42 U.S.C. §18023. Insurers are not required to provide notice regarding whether a plan includes abortion except for a mention in the summary of benefits provided at initial enrollment. 45 CFR §156.280 (implementing 42 U.S.C. § 18023). Even then, the notice will describe only the total premium payments and will not reference the separate "abortion premium" payment required for plans

that cover abortions. 45 C.F.R. §156.280(f). If an individual's employer subscribes to an exchange plan that includes abortion coverage, then the individual will be required to make "a separate payment" from his personal funds or payroll deduction directly into an allocation account to be "used exclusively to pay for" elective surgical abortions. 45 CFR §156.280(e) (implementing 42 U.S.C. § 18023). The Act and regulations do not provide exemptions for enrollees who are opposed to subsidizing surgical abortions who might nonetheless face these abortion payments because of the lack of notice of the abortion provision and because of a third party's choice of plan within an exchange. 45 CFR §156.280(e)(2)(i). Contrary to the Fourth Circuit's assertion, these provisions raise more than a plausible claim that complying with the insurance mandates will substantially burden religious exercise.

In addition, regulations implementing the "essential health benefits" requirement for minimum essential coverage under the Employer Mandate have placed employers in a Hobson's choice of either violating their religious beliefs or paying perhaps millions of dollars in penalties for failing to comply with the mandate. 45 CFR §147.130 (implementing 42 U.S.C. §300gg-13).[4]

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[4] The Fourth Circuit declined to address the implementing regulations, claiming that

Those regulations provide that the "preventive care" services that must be provided without cost in order for a health care plan to qualify as "minimum essential coverage" must include coverage for all FDA-approved "contraceptive" drugs and devices, which include abortion-inducing drugs and devices. *See id.* Religious employers with sincerely held religious beliefs against subsidizing, facilitating or accommodating abortions, including chemical abortions, such as Liberty University, must choose either to abandon their religious beliefs or face penalties for non-compliance with the Act. 26 U.S.C. §§36B, 4980D, 4980H.

Individuals such as Petitioners Waddell and Merrill whose religious beliefs proscribe any participation in abortion as a grave moral evil must choose between purchasing insurance that may require that they subsidize abortion or pay penalties for adhering to their religious beliefs by not purchasing coverage that subsidizes abortions. Employers are placed under the additional pressure of having to pay perhaps millions of dollars in penalties unless they are willing to violate their religious beliefs by paying for chemical abortions. Religious

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they were new issues not previously raised. (App. 70a-71a). That determination itself contradicts established precedent, as discussed below.

adherents thus face a version of the adage "your money or your life," only in this case it is "your money or your religious beliefs."

This is precisely the kind of Hobson's choice that this Court has determined represents a substantial burden on religious exercise. *Thomas*, 450 U.S. at 717-718; *O Centro*, 546 U.S. at 428.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

*Thomas*, 450 U.S. at 717-718. "A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly . . . interfered with the free exercise of religion." *NFIB v. Sebelius*, 132 S.Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part). The Fourth Circuit's conclusion that there is not even a plausible

claim of a burden present in the Act contravenes this precedent and should be reviewed by this Court.

### B. The Fourth Circuit's Conclusion That The Act Does Not Substantially Burden Religious Exercise Creates An Inter-Circuit Conflict That Should Be Resolved By This Court.

Standing in sharp contrast to the Fourth Circuit's determination that there is not even a plausible claim that the Act substantially burdens religious exercise is the Tenth Circuit's conclusion that the Employer Mandate as fully defined creates a substantial burden as a matter of law. *Hobby Lobby,* 2013 WL 3216103. In addition, appellate panels in the Seventh and Eighth circuits have found that employers bringing RFRA challenges to regulations that implement the Employer Mandate have stated sufficient claims to warrant injunctions pending appeal. *Grote,* 708 F.3d 850; *Korte,* 2012 WL 6757353; *Annex Medical,* 2013 WL 1276025. Furthermore, the Administration has voluntarily dismissed an appeal in the District of Columbia Circuit and left in place an injunction based upon a finding that there was a substantial likelihood that challengers would prevail on their RFRA challenge. *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp.

2d 106, 121 (Dist. D.C. 2012) *appeal dismissed*, 2013 WL 2395168 (D.C. Cir. 2013). Since the question of whether the mandate substantially burdens religious exercise is of extreme constitutional importance, this inter-circuit conflict should be resolved by this Court.

*Hobby Lobby, Grote, Korte, Annex Medical* and *Tyndale House* are five of more than 65 cases that have been filed challenging the definition of "essential health benefits" required to comply with the Employer Mandate to include contraceptive and abortifacient drugs and devices as women's "preventive care."45 CFR §147.130 (implementing 42 U.S.C. §300gg-13).[5] In each case, the circuit court found that allegations substantially similar to those raised by Petitioners established a substantial likelihood of success on the merits that the Employer Mandate as fully defined to include the Preventive Care Mandate imposed a substantial burden on religious exercise.

In *Hobby Lobby*¸ the Tenth Circuit sitting en banc held that the plaintiffs showed that the Employer Mandate as fully defined imposes a substantial burden on their religious free exercise because the employers are required to: (1) compromise their religious beliefs, (2) pay

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[5] See http://www.becketfund.org/hhsinformat-ioncentral/ (last visited August 16, 2013) (listing active cases challenging the preventive care mandate).

close to $475 million more in taxes every year, or (3) pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees. 2013 WL 3216103 at *21. "This is precisely the sort of Hobson's choice described in *Abdulhaseeb[v. Calbone,* 600 F.3d 1301 (10th Cir.2010)], and Hobby Lobby and Mardel have established a substantial burden as a matter of law." *Id.*

In *Korte,* plaintiffs alleged that the Employer Mandate substantially burdened their religious free exercise by requiring them, on pain of substantial financial penalties, to provide and pay for an employee health plan that includes no-cost-sharing coverage for contraception, sterilization, and related medical services that their religion teaches are gravely immoral. 2012 WL 6757353 at *3. Similarly, in *Grote*, plaintiffs alleged that the mandate "compels them to materially cooperate in a grave moral wrong contrary to the teachings of their church and levies severe financial penalties if they do not comply." 708 F.3d at 854. Likewise in *Annex Medical,* the plaintiff alleged that paying for a group health plan that includes the "preventive care" coverage is "sinful and immoral," because it requires that the business "pay for contraception, sterilization, abortifacient drugs and related education and counseling, in violation of his sincere and deeply-held religious beliefs…." 2013 WL 1276025. In each case, the courts held

that the allegations of "substantial burden" were sufficient to support an injunction pending appeal.

In *Tyndale House,* the district court said:

> As was true in *Thomas*, the contraceptive coverage mandate similarly places the plaintiffs in the untenable position of choosing either to violate their religious beliefs by providing coverage of the contraceptives at issue or to subject their business to the continual risk of the imposition of enormous penalties for its noncompliance. Such a threat to the very continued existence of the plaintiffs' business necessarily places substantial pressure on the plaintiffs to violate their beliefs. Government action that creates such a Hobson's choice for the plaintiffs amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise.

904 F. Supp. 2d at 121. The Administration initially appealed the district court ruling to the District of Columbia Circuit, but voluntarily dismissed the appeal, leaving the district court decision in place. 2013 WL 2395168.

The Fourth Circuit found that Petitioners' similar claims did not even reach the level of plausibility. (App. 68a). The court cited *Thomas* in support of its conclusion, which itself contradicts *Thomas* and conflicts with the other circuits' contrary findings. Integral to the court's conclusion was its refusal to consider the "Preventive Care Mandate" implementing regulations. That refusal also contradicts established precedent and should be reviewed.

## V. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S RULING AND THIS COURT'S PRECEDENT ESTABLISHING THAT LAWS ARE TO BE REVIEWED AS THEY EXIST AT THE TIME OF APPELLATE REVIEW.

Since the time of Chief Justice Marshall, this Court has recognized that appellate courts must address laws as they exist at the time of review and thereby take account of intervening regulations and changes that affect the court's analysis. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-83 (1969) (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). Consequently, when an agency enacts regulations that refine or implement statutory provisions during the pendency of litigation,

then the appellate court reviewing a challenge to the law is obligated to consider the law as it exists at the time of review, *i.e.*, as refined by the regulations. *Id.* The Fourth Circuit contradicted that precedent when it refused to consider the Employer Mandate as it existed at the time of its consideration of Petitioners' challenges on remand, *i.e.,* as defined by the "Preventive Care Mandate" regulations. (App. 68a-75a).

In *Thorpe,* this Court quoted Chief Justice Marshall's exposition of the rule:

> (I)f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, * * * I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot

> be affirmed but in violation of law,
> the judgment must be set aside.

*Id.* at 282 (citing *Schooner Peggy*, 5 U.S. at 110). "This same reasoning has been applied where the change was constitutional, statutory, or judicial. Surely it applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." *Id.* at 282-283. "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943).

The "Preventive Care Mandate," which requires that health insurance policies provide no-cost coverage for contraceptives, including abortion-inducing drugs and devices, was enacted by the Administration as part of its delegated duty to fully define the essential health benefits that must be included in order for an insurance policy to satisfy the Employer Mandate. Section 1302 of the Act, codified at 42 U.S.C. §18022(a); 42 U.S.C. §300gg-13. Consequently, at the time that the Fourth Circuit reviewed Petitioners' challenges on remand, the Employer Mandate required that employers with 50 or more full-time employees provide health insurance coverage that includes no-cost contraceptives, including abortion-inducing drugs and devices, in order to comply with the Act. 45 CFR §147.130.

Under this Court's precedents, therefore, the Fourth Circuit was required to analyze the Employer Mandate as it existed at the time of remand, *i.e.,* as fully defined by the "Preventive Care Mandate." *Thorpe*, 393 U.S. at 282-283; *Ziffrin,* 318 U.S at 78. Instead, the Fourth Circuit contradicted established precedent when it refused to consider the "Preventive Care Mandate" provision within the Employer Mandate on the grounds that the issue was not properly before the Court. (App. 68a-75a). Rather than acknowledging that the "Preventive Care Mandate" was part of the Employer Mandate as it existed at the time of remand, the Fourth Circuit decided that preventive care was an entirely new issue being improvidently raised by Petitioners. (App. 70a-71a). The court intimated that Petitioners were attempting to raise "substantially different legal issues from the...arguments [already] propounded in th[e] lawsuit." (App. 72a citing *Phillips v. McLaughlin*, 854 F.2d 673, 676–77 (4th Cir.1988)). In fact, as was true in *Thorpe* and *Ziffrin*, Petitioners asked that the Fourth Circuit analyze the Employer Mandate as it existed at the time of remand.

The Fourth Circuit's refusal to consider the Employer Mandate as fully defined conflicts with this Court's precedents. This Court should grant review and resolve the conflict.

## CONCLUSION

The Fourth Circuit's ruling contradicts this Court's precedents and creates an inter-circuit conflict with the Tenth, Seventh and Eighth circuits. This Court should accept plenary review to resolve the conflicts presented by this case, including whether the Employer Mandate is supported by the Taxing and Spending Clause or the Commerce Clause, and whether the Individual and Employer Mandates violate religious free exercise.

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