No. 12-1380

In the U.S. Court of Appeals for the Tenth Circuit

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND; CHRISTINE KETTERHAGEN; ANDREW NEWLAND; AND HERCULES INDUSTRIES, INC., A COLORADO CORPORATION,
Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*
Defendants-Appellants.

APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO, NO. 1:12-cv-01123, HON. JOHN L. KANE, JR., DISTRICT JUDGE

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 1, 2013

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") files this brief with the consent of all parties. Eagle Forum ELDF 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 ELDF has a direct and vital interest in the issues presented before this Court.[1]

STATEMENT OF THE CASE AND FACTS

This litigation asks both (1) whether the federal government can 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, and (2) whether the affected public can challenge such overreach under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA"). *Amicus* Eagle Forum ELDF 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-appellants Department of Health & Human Services and its officers (collectively, the "Administration") have injected these controversial requirements to implement a vague 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").[2]

Amicus Eagle Forum ELDF adopts the appellees' Statement of Facts. *See* Appellees' Br. at 2-5. In summary, Hercules, Inc. ("Hercules") a close corporation formed under Colorado law and its five individual shareholders and owners

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[2] The Administration adopted these Guidelines by indirect final rule.

(collectively, the "Newlands") have sued the Administration under the First Amendment and RFRA to enjoin the Mandate's preventing their living their lives and running their business in accordance with their Catholic faith. Under that 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 the Newlands' beliefs and faith.

<u>SUMMARY OF ARGUMENT</u>

The Mandate's promulgation without the required notice-and-comment

rulemaking violated not only the Administrative Procedure Act ("APA") (Section I.B) but also the Constitution (Section I.A). As a result, the Mandate cannot qualify as a compelling interest under RFRA or even a public interest under the test for preliminary injunctions and certainly commands no deference (Section I.C). With respect to the free exercise of religion, the Administration has no right to impose its orthodoxy on the Newlands, 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 II.A). Similarly, the Supreme Court already has rejected the Administration's attempt to deny religious freedom to corporations (Section II.B).

On the merits, PPACA's delegation to the Administration is impermissibly open-ended and standardless (Section III.A) in an area of traditional state regulation to allow a federal agency to adopt preemptive rules, especially rules without notice-and-comment rulemaking, when the federal government should be working under a presumption *against* preempting state laws in this field of traditional state involvement (Section III.B). Indeed, the presumption against preemption allows this Court to interpret PPACA narrowly, without resort to the Administration's interpretation (Section III.C). Viewed without deference to the Administration and with deference instead to the states in our federalist structure, PPACA's requirement for "preventive care" correlates to the prevention of disease, not the prevention of pregnancy (Section III.D).

ARGUMENT

I. THE MANDATE VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA AND THE CONSTITUTION

The "history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. U.S.,* 318 U.S. 332, 347 (1943), *abrogated on other grounds,* 18 U.S.C. §3501(a). Before addressing the substantive merits, *amicus* Eagle Forum ELDF first reviews the procedural merits. Although the Newlands do not press the issue on appeal, understanding the Mandate's procedural defects will help guide this Court's assessment of their overall merit.

Although PPACA's authorization for preventive care does not *per se* require that HHS act by notice-and-comment rulemaking, 42 U.S.C. §300gg-13(4) (requiring only "comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph"), it does not enact an exemption from the APA either. "Legislative rules 'affect[] individual rights and obligations,'" *Ballesteros v. Ashcroft,* 452 F.3d 1153, 1158 (10th Cir. 2006) (*quoting Morton v. Ruiz,* 415 U.S. 199, 232 (1974)), and when "a challenged agency action creates a 'legislative rule,' then full compliance with the APA's notice and comment processes is required." *Id.* The Mandate plainly qualifies as a legislative rule, and therefore the Mandate needed to comply with the notice-and-comment procedures unless a valid exception applies.

A. The Mandate Violated the Constitution's Law-Making Requirements

Although the more typically contested procedural issues arise under the APA – and the Administration's failure to comply with the APA – this Court should not forget the underlying constitutional issues: "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) (congressionally proscribed rulemaking procedures). 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). 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); *North Am. Coal Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 854 F.2d 386, 388 (10th Cir. 1988); *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 failed to comply with the APA, the Administration's attempt to make law violates not only the APA but also the Constitution.

B. The Mandate Violated the APA's Rulemaking Requirements

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." In the absence of a viable exception to notice-and-comment rulemaking, the concept of interim final rules (*i.e.,* rules that take effect until the agency gets around to promulgating lawful rules) is foreign to the APA.

The Administration's good-cause findings fail to meet the high standard for avoiding APA-required rulemakings, a standard on which the Administration bears the burden. *Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741, 751 (10th Cir. 1987). As this Court explained, the statutory burdens are steep:

> "'*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."

Id. (*quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (emphasis in *Hodel)*. Under these tests, the Mandate nowhere reaches the required level of "essentially an emergency procedure." *Id.* (*quoting Buschmann v. Schweiker,* 676 F.2d 352, 357 (9th Cir. 1982)). "[I]t 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). If context matters, the Administration's failure to even understand its own regulations with respect to abortion, *see* Section II.A, *infra,* and the federal sovereign's duties with respect to the states under preemption law, *see* Section III.B, *infra,* counsel against allowing *this* agency to sidestep otherwise-required procedures.

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

Under 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. *Att'y. Gen. of Okla. v. Tyson Foods, Inc.,* 565 F.3d 769, 776 (10th Cir. 2009). But procedurally infirm rules are a nullity: "It is fundamental law that a rule promulgated by a federal agency is not valid unless adopted in substantial compliance with the requirements of the APA.." *North Am. Coal Corp.,* 854 F.2d at 388. Similarly, the Mandate's procedural defects deny the Administration controlling deference from this Court:

> *Chevron* deference to that condition would be inappropriate because, unless interested parties could reasonably anticipate the application of the regulation advanced by the agency such that they had a meaningful opportunity for notice and comment on the conditions to be selected, the imposition of an additional condition would not actually follow from an exercise of the agency's delegated policymaking authority.

Mission Group Kansas, Inc. v. Riley, 146 F.3d 775, 781-82 (10th Cir. 1998);[3] *Headrick v. Rockwell Int'l Corp.,* 24 F.3d 1272, 1282 (10th Cir. 1994) ("while [an interpretive rule] may be entitled to some consideration in our analysis, it does not carry the force of law and we are in no way bound to afford it any special deference under *Chevron*") (citations omitted).

In light not only of the Mandate's procedural defects but also of the strong merits arguments against the Mandate, *see* Section III, *infra,* the Administration cannot rely on the Mandate as either a compelling interest or even a public interest.

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[3] *Chevron* refers to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

There simply is no there there.

II. THE HHS REGULATIONS BURDEN RELIGION

The Newlands and the other supporting *amicus curiae* ably brief the right to religious freedom and the Newlands' entitlement to relief. *See* Appellees' Br. at 13-58. Instead, *amicus* Eagle Forum ELDF focuses on two issues: the relevant religious views on abortifacients, regardless of the Administration's views, and the right of entities like corporations to religious freedom.

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

In a statement that ably demonstrates how notice-and-comment rulemaking helps to ensure informed decision-making, *Chrysler Corp.,* 441 U.S. at 316 ("Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment"), the Administration claims that the Newlands' belief that the Plan B morning-after-pill and Ella week-after-pill are abortifacients violates "federal law." Appellants' Br. at 4-5 n.3 (*citing* 62 Fed. Reg. 8610, 8611 (1997) *and* 45 C.F.R. §46.202(f)). The Administration's view is irrelevant, false, and pernicious.

At the outset, conscience rights are defined by the rights holder, not defined 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)). Thus, 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). The Newlands 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. *See* 45 C.F.R. §46.202. More importantly, HHS's predecessor did not reject a fertilization-based definition for all purposes and retained the implantation-based definition only "to provide an administerable policy" for a specific purpose (namely, 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. The enacting Congress expressly held as much by providing that this 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 of HEW 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 also uses a fertilization 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.

The Administration's posture as the protectors of science underscore the importance of rejecting its ham-fisted efforts to redefine the acceptable views in these sensitive areas. This Nation was founded on principles of freedom of religion, not on government-defined orthodoxy.

B. Corporations Can Assert Claims of Religious Freedom

The Administration's argument that corporations such as Hercules cannot assert free-exercise claims is plainly misplaced. *Citizens United v. Federal Election Comm'n,* 130 S. Ct. 876, 899 (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 rights to 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 Hercules 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 regard to RFRA, the Newlands and Hercules can challenge the Mandate.

If anything, RFRA extends the ability of a corporation and its owners to assert a right to religious freedom. RFRA adopts 42 U.S.C. §2000cc-5 as its definition of "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 Hercules is not real property, it is nonetheless property that the Newlands use in the exercise of their faith. Because the RFRA definition extends broadly to *any* exercise of religion,[4] it plainly is broad enough to include the Newland's use of Hercules to live their lives according to their faith.

III. THE MANDATE EXCEEDS HHS'S AUTHORITY

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

A. The Mandate Violates the Non-Delegation Doctrine

As signaled in Section I.A, *supra,* with respect to agencies' rulemaking authority, "[t]he nondelegation doctrine arises from the constitutional principle of

[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).

separation of powers, specifically Article 1, §1, which provides that all legislative Powers herein granted shall be vested in a Congress of the United States." *U.S. v. Barrett,* 496 F.3d 1079, 1108 (10th Cir. 2007) (interior quotations omitted). Under this doctrine, "Congress may not constitutionally delegate its legislative power to another branch of government." *Id.* (interior quotations omitted). That said, Congress can "seek assistance, within limits, from coordinate branches of government," *id.* (interior citations omitted), and so long as Congress provides "'an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *U.S. v. Mistretta,* 488 U.S. 361, 372 (1989). Here, PPACA provide 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 III.B, *infra.* The Constitution does not allow Congress to write the Administration a blank check to circumvent state authority.

B. <u>The Presumption Against Preemption Applies</u>

As explained in Section III.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 intrusion. 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 Regulates in a Field Occupied by the States

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 an expansion into several fields and sub-fields already occupied by the states. 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; MINN. STAT. §§62J.01, 62J.04; 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).[5] 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 determine 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 (of 48) regulated warehouses. *See 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

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[5] 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.

warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.* 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.

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 preempted state laws where Congress did not provide clear and manifest evidence of its intent to preempt these state laws, the 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. As indicated in Section I.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. *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). The federal appellate courts have adopted a similar approach. *See, e.g., National 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). At the very least, 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 an

agency 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 I.C, *supra.* Second, because the states already occupied insurance coverage for preventive care and conscience protections, *see* Section III.B.1, *supra,* the presumption against preemption applies here to the extent that the Administration attempts to displace either body of state law with a uniform federal rule. *See* Section III.B.2, *supra.* That traditional tool of statutory construction allows this Court to interpret PPACA without resort to the Administration's interpretations. *See* Section III.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, the Court can take one or both of two paths.

First, in order to avoid displacing state regulation of preventive care to the fullest 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.

Second, 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. This would minimize or even eliminate PPACA's impacts on pre-existing state laws that protect rights of conscience and freedom of religion.

Under either path, the Newlands will prevail. Moreover, as indicated, the Court can take *both* paths. What these various tools of statutory construction prohibit, however, is the Administration's election to avoid both paths.[6]

CONCLUSION

For the reasons set forth above and by the Newlands, *amicus* Eagle Forum respectfully submits that this Court should affirm the district court's preliminary injunction against the Mandate.

[6] 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 violates religious freedom, even if the added cost is free.

Dated: March 1, 2013

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1. The foregoing motion and the accompanying brief comply with the privacy requirements of Tenth Cir. Rule 25.5 because the motion and brief do not contain any private information that that rule would require to be redacted.

2. The foregoing brief, and the attached certificates have been scanned for viruses with the most recent version of a commercial virus scanning program, Norton 360, and according to the program are free of viruses.

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