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TESTIMONY OF MATHEW STAVER
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The threat to religious freedom has reached unprecedented levels. These threats are more significant and severe than at any time in recent history. My testimony will focus on two areas where this threat has reached a critical point. These involve conflicts between religious freedom and (1) the sanctity of human life, and (2) human sexuality and natural marriage.

The First Amendment protects the rights of every individual to enjoy the free exercise of religion and to be protected against discrimination because of their sincerely held religious beliefs. Unfortunately, in today's culture, the fundamental right to live according to the dictates of one's conscience and sincerely held religious beliefs is slowly being eroded. The Patient Protection and Affordable Care Act ("ObamaCare"), combined with the regulations promulgated in support of it, have introduced an unprecedented intrusion into the rights of businesses and organizations to operate consistent with the sincerely held religious beliefs of their owners and officers that life is a gift from the Creator and that providing anything to employees that would

destroy life is immoral and inconsistent with Scripture. The same is true of individuals under the individual mandate.

The religious freedom of licensed mental health professionals, minors, and their parents are also under unprecedented assault. Homosexual activists have attempted to enact laws throughout the country that would silence mental health professionals from expressing the truth that an individual can successfully reduce or eliminate unwanted same-sex attractions, behaviors, or identity and live consistent with their sincerely held religious beliefs concerning human sexuality. Those efforts are nothing more than an attempt to censor any viewpoint concerning Scriptural teaching on human sexuality, and they represent one of the greatest assaults on children and families that has arisen in recent times. Parents have a fundamental right to direct the upbringing and education of their children, consistent with their sincerely held religious beliefs, and these efforts are an affront to that fundamental relationship and an assault on religious freedom.

The freedom of religious business owners and organizations is also under unprecedented assault as a result of same-sex marriage, sexual orientation, and gender identity laws spread throughout the country. There are numerous challenges to states' constitutional amendments and statutes defining marriage as the union of one man and one woman. Judges have been tripping over one another to ignore the rule of law and the will of the people to invalidate the institution of marriage and silence any opposition to their ideology. The destruction of the institution of marriage is not only harmful to society at large, but it has resulted in unprecedented intrusion into the religious freedoms of individuals and businesses that have been attacked for operating their business according to the dictates of their conscience.

SUMMARY OF LIBERTY UNIVERSITY'S CHALLENGE TO OBAMACARE

Liberty Counsel filed the first private party challenge to the Patient Protection and Affordable Care Act on the date that it was signed into law, March 23, 2010. The Complaint was filed on behalf of Liberty University and various individuals and sought declaratory and injunctive relief under 42 U.S.C. §1983. Liberty Counsel alleged, *inter alia*, that the individual and employer mandates exceed Congress's delegated powers under Article I, §8 of the Constitution, including the Commerce Clause and Taxing and Spending Clause, and violate free exercise rights 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 other 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 three-judge panel of the Fourth Circuit, consisting of two appointees of President Obama and one appointee of President Clinton, 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 to the Supreme Court of the United States on the issue of whether the AIA applied to Petitioners' claims. The Court held the Petition and directed that the AIA argument in the Liberty University case be included in its consideration of other ObamaCare challenges, which were decided in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

In *NFIB*, the Supreme 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's 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*, 733 F.3d 72 (4th Cir. 2013).

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. The Fourth Circuit held that the Employer Mandate is a permissible exercise of Congress's Commerce Clause authority. The Fourth Circuit also found that the Employer Mandate is a permissible exercise of Congress's authority under the Taxing and Spending Clause. The Fourth Circuit dismissed Petitioners' Free Exercise challenge to both the individual and employer mandates, finding that the Act is a neutral law of general applicability that does not violate the Free Exercise Clause. 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. 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.

OBAMACARE AND RELIGIOUS FREEDOM

ObamaCare threatens religious liberty in a number of aspects in both the individual and employer mandates.

Religious “Conscience” Exemptions

The initial religious liberty issue is in the provisions that define who is subject to the individual mandate, 26 U.S.C. §5000A. Subsection (d) exempts two groups of people from the individual insurance mandate under “religious exemptions”: (1) Individuals who are members or adherents of “recognized religious sects” under 26 U.S.C. §1402(g)(1); (2) Individuals who are members of “healthcare sharing ministries,” defined as nonprofit organizations in existence since December 31, 1999, comprised of members who share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed, who retain membership even after they develop a medical condition.

These exemptions provide preferential treatment to those who have certain religious beliefs, while leaving those who do not adhere to those beliefs subject to the insurance mandate. The Supreme Court has established that the government cannot favor one set of religious beliefs over another or favor religion over irreligion.

The Abortion Premium Mandate

An abortion premium mandate originated in Section 1303 of the Affordable Care Act, as codified at 42 U.S.C. § 18023, and has been subsequently implemented in regulations governing Exchanges that were finalized on March 27, 2012.

The accounting scheme laid out in the provisions of Section 1303 was devised to overcome the political hurdle of “taxpayer subsidized abortion.” This became necessary because the ACA allowed health plans to provide elective abortion coverage within the government-subsidized Exchanges, contrary to former federal policy. The ACA breaks with the consistent federal policy since 1996 of prohibiting coverage for elective abortion in subsidized plans offered through the Federal Employees Health Benefits Plan, military insurance through TRICARE, or Indian Health Services.¹ Section 1303 became known as the “Nelson Compromise” because it arose out of an attempt by Senator Ben Nelson, a pro-life Democrat, to find language that would “make it clear that [the healthcare bill] does not fund abortion with government money.” Section 1303 provides:

In plans that do provide non-excepted [elective] abortion coverage, a separate payment for non-excepted [elective] abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted [elective] abortion services. Insurers are prohibited from using funds attributable to premium tax credits or [federal] cost-sharing reductions . . . to pay for non-excepted [elective] abortion services.

ACA, § 1303(b)(2)(B), (C). The implementing regulations for Section 1303 provide that each enrollee in Exchange plans that happen to include abortion coverage is mandated to make “a

¹ Ernest Istook, *The Real Status Quo on Abortion and Federal Insurance*, The Heritage Foundation (November 11, 2009), available at <http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/>

separate payment” from his own personal funds or payroll deduction directly into an allocation account to be “used exclusively to pay for” other people’s elective surgical abortion. 45 CFR §156.280(e) (implementing ACA, Section 1303(b)(2)(B), as codified at 42 U.S.C. § 18023). This abortion premium mandate applies “without regard to the enrollee’s age, sex, or family status,” 45 CFR § 156.280(e)(2)(i), and with no exemption for enrollees who consider the practice and direct funding of surgical abortion to be a grave moral evil.

An additional provision creates a “land mine” for those who object to paying for abortions, in that the ACA and its implementing regulations effectively instruct insurers to conceal elective abortion coverage and the separate abortion premium. Section (f)(1) of 45 CFR §156.280 provides that notice about a plan’s inclusion of elective abortion coverage be disclosed, not in Exchange advertising, but rather “only . . . at the time of enrollment.” Further, section (f)(2) prohibits issuers from disclosing the separate elective abortion premium in Exchange advertisements, and even in the summary of benefits provided at enrollment. Rather, it requires that the issuer must provide notice “only with respect to the total amount of the combined payments” of regular premiums and the abortion premium. The “secrecy clause” reads as follows:

(f) Rules relating to notice.

(1) Notice. A QHP [qualified health plan] that provides for coverage of services in paragraph (d)(1) of this section [elective abortion], must provide a notice to enrollees, only as part of the summary of benefits and coverage explanation, at the time of enrollment, of such coverage.

(2) Rules relating to payments. The notice described in subparagraph (f)(1) of this section, any advertising used by the QHP issuer with respect to the QHP, any information provided by the Exchange, and any other information specified by HHS must provide information only with respect to the total amount of the

combined payments for services described in paragraph (d)(1) of this section [elective abortion] and other services covered by the QHP.

45 C.F.R. § 156.280(f), 77 Fed. Reg. 18472-73.

Consequently, those whose religious beliefs prohibit them from facilitating, subsidizing or otherwise participating in abortions cannot ensure that their religious beliefs are protected.

Minimum Essential Coverage

Other religious liberty issues arise from the definition of the “minimum essential coverage” that is required in order for health insurance to qualify as an approved health plan under the individual or employer mandates. A policy must cover “essential health benefits,” which were defined in the Act generally to include, “at a minimum,” coverage for emergency treatment, prescriptions, mental health care, laboratory, maternity care, pediatric care, and no-cost preventive care 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” under 42 U.S.C. §18022(b). 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. HHS directed the Institute of Medicine (“IOM”) to draft recommendations for the preventive coverage mandate. “Preventive health services for women” were defined as measures “shown to improve wellbeing, and/or decrease the likelihood or delay the onset of a targeted disease or condition.”

IOM recommended that these measures include free “contraceptive” coverage, testing for sexually transmitted diseases, and screening and counseling for domestic violence. “Contraceptive coverage” (“Preventive coverage” or “Preventive mandate”) includes contraceptive medication, sterilization, abortion-inducing drugs (referred to herein as abortifacients, which include the so-called “emergency” or “morning after” drugs), and intra-uterine devices (“IUDs”). Abortifacients and IUDs often cause abortion and are not merely contraceptives.

HRSA incorporated the IOM recommendations into its “comprehensive guidelines” on women’s preventive coverage in 42 U.S.C. §300gg-13(4). Those guidelines require that health insurance policies must include, *inter alia*, “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity” in order to qualify as “minimum essential coverage” necessary to satisfy the individual and employer mandates. FDA-approved “contraception” includes so-called “emergency contraception,” Levonorgestrel, also known as “Plan B” or the “morning after pill,” and Ulipristal acetate, also known as “Ella” or the “week after” pill,² both of which often act as abortifacients by terminating the life of a pre-born child.³ During hearings regarding FDA approval for Ulipristal, medical professionals presented evidence that “Ulipristal

² FDA Office of Women’s Health Birth Control Guide, available at <http://www.fda.gov/birthcontrol> (last visited June 8, 2014).

³ American Association of Pro-Life Obstetricians and Gynecologists (“AAPLOG”), Comment to Docket No. FDA–2010–N–0001 Advisory Committee for Reproductive Health Drugs; Notice of Meeting Ulipristal acetate tablets, (NDA) 22–474, Laboratoire HRA Pharma. (June 2, 2010), *available at* http://www.aaplog.org/wp-content/uploads/2010/06/AAPLOG-Ulipristal-Comments_2010.pdf (last visited June 8, 2014).

acetate is an abortifacient of the same type as mifepristone (“RU-486”) and that its approval as an emergency contraceptive raises serious health and ethical issues.”⁴

There is no doubt that Ulipristal acts as an abortifacient because the drug blocks progesterone receptors at three critical areas. These blocking capabilities form the basis of its embryocidal abortifacient mechanism. That mechanism is identical to the action of RU-486 in early pregnancy.⁵

The FDA guide to “contraceptives” states that “Plan B” and “Ella” prevent “attachment (implantation) [of the embryo] to the womb (uterus).”⁶ FDA-approved “contraceptives” also include IUDs, which similarly prevent implantation of embryos and thereby terminate human life, and surgical sterilization.⁷ Several religiously based organizations notified the HHS that “requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom.”⁸ The Administration responded by granting HRSA discretion to consider a religious employer exemption, saying “it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate.” The Administration specified that it only wanted “to provide for a religious accommodation that respects the unique relationship between a house of worship and

⁴ *Id.*

⁵ *Id.*

⁶ FDA Birth Control Guide at 16-17, <http://www.fda.gov/birthcontrol> (last visited June 8, 2014).

⁷ *Id.* at 18-19.

⁸ *See, e.g.*, Letter from General Counsel, U.S. Conference of Catholic Bishops to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (August 31, 2011), stating that the proposal violates the First Amendment and RFRA, available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf>.

its employees in ministerial positions.” The amendment provided only that HRSA “may establish exemptions” from the contraceptive mandate for “religious employers.” “Religious employers” was initially defined as those whom HRSA determined met all of the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; and (4) The organization is a nonprofit church, integrated auxiliary, convention or association of churches or a religious order.

Faith-based organizations informed the Administration that the August 2011 exemption did not resolve the violations of right of conscience contained within the Preventive mandate. In response, the Administration postponed implementation of the Preventive mandate by creating a narrowly defined one-year “temporary enforcement safe harbor” for nonprofit organizations that had religious objections to contraceptives and abortifacients but did not fall within the “religious employer” exemption. 77 Fed. Reg. 8,725, 8,728 (February 15, 2012). The Administration represented that the safe harbor would be used to develop alternative accommodations for nonprofit organizations that do not meet the religious employer exemption and object to providing Preventive mandate services. Meanwhile, President Obama emphasized that any new accommodation must retain the provision of free contraceptives (and abortifacients) and that insurance companies would be required to cover contraceptives (and abortifacients) if the religious organization objected.

The final HHS regulations modify the “religious employer” exemption to remove the first three requirements so that an exemption is available to “a nonprofit church, integrated auxiliary,

convention or association of churches or a religious order.” *Id.* at 8,474. No further exemptions are available, but there is an “accommodation” for “eligible organizations.” An “eligible organization” is defined as a nonprofit organization that “holds itself out as a religious organization” and opposes providing some or all of the services under the Preventive mandate. *Id.* Organizations covered by an insurance carrier would allegedly not have to directly pay for the objectionable products. *Id.* at 8,475. The organization would notify its insurance carrier that it objects to paying for certain contraceptive or abortifacient coverage. *Id.* The insurer would then be required to “automatically provide health insurance coverage” for the objectionable services through a separate insurance policy without cost to employees. *Id.* According to the proposal, the issuer of the separate policy could not directly or indirectly charge a fee or premium to the nonprofit organization for the objectionable contraceptive or abortifacient services. *Id.* For these organizations, which are not self-insured, the Administration proposes that the cost of the separate contraceptive/abortifacient policy would be paid for through reductions in the fees the insurer would pay to government insurance exchanges. *Id.*

The Administration has not offered a final proposal for self-insured organizations, such as Liberty University, regarding how the third party coverage would be funded. *Id.* at 8,474. Instead, the Administration offered possible scenarios, each involving some sort of federal fee offset for a third party administrator providing separate contraceptive or abortifacient coverage, and asked for public comments for other approaches. *Id.* at 8,463-8,464. The Administration had no proposal for how self-insured, nonprofit organizations without third party administrators will be able to comply with providing free contraceptives or abortifacients without incurring costs themselves. *Id.* at 8,464. The contraceptives and abortifacients cost something, and someone has

to pay. The Administration says that the person receiving the drugs is not to pay, but also says that the employer who objects to providing such products will “not be required to contract, arrange, pay, or refer for contraceptive coverage.” *Id.* at 8,463. It remains to be seen how that will be accomplished.

Challenges to the Preventive Care Mandate

The substantial burden posed on religious free exercise has sparked a firestorm of litigation. More than 100 lawsuits, representing over 300 plaintiffs including hospitals, universities, businesses, schools, and individuals, have been filed in federal courts throughout the country.

Two of those cases, *Conestoga Wood Specialties Corp v. Sec’y of U.S. Dep’t of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. 2013), and *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) are now pending before the United States Supreme Court after conflicting rulings from the Third Circuit, which denied an injunction against the Preventive Care Mandate, and the Tenth Circuit, which granted an injunction.

Fifty-nine preliminary injunctions have been granted. Preliminary Injunctions have been denied in eight cases. Twenty-one cases have been dismissed.

The other cases challenging the Preventive Care Mandate as violative of religious liberty, in alphabetical order, include:

American Family Assn. v. Sebelius, Northern District of Mississippi Case No. 13-cv-00032, Voluntarily dismissed July 19, 2013

Am. Pulverizer Co. v. U.S. Dep’t of Health & Human Servs., 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) Preliminary Injunction granted

Annex Medical, Inc. v. Sebelius, 2013 WL 1276025 (8th Cir. 2013) Granting Injunction pending appeal

Archdiocese of Miami v. Sebelius, SD of Fla. Case No. 12-cv-23820 Motion to Dismiss granted.

Archdiocese of St. Louis v. Sebelius, 920 F. Supp. 2d 1018 (E.D. Mo. 2013) Granting Motion to Dismiss

Armstrong v. Sebelius, District of Colorado Case No. 13-cv-00563 Preliminary Injunction Granted September 17, 2013.

Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013) Affirming denial of Preliminary Injunction. Petition for Writ of Certiorari filed Oct. 15, 2013.

Ave Maria University v. Sebelius, M.D. Fla. Case No. 13-cv-630, stayed pending Supreme Court decision in *Hobby Lobby and Conestoga Woods*

Barron Industries, Inc. v. Sebelius, D.C. District Court Case No. 13-CV-1330, Unopposed PI motion granted September 25, 2013

Beckwith Elec. Co., Inc. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013) Granting Preliminary Injunction

Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25 (D.D.C. 2012) dismissing case, appeal held in abeyance, 703 F.3d 551 (D.C. Cir. 2012)

Bick Holdings, Inc. v. Sebelius, E.D. of Missouri Case No. 13-cv-00462, Unopposed Motion for Preliminary Injunction and Stay granted April 1, 2013

Bindon (Trijicon) v. Sebelius, Dist. of D.C. Case No. 13-cv-1207-EGS, Unopposed Motion Preliminary Injunction granted August 14, 2013

Briscoe v. Sebelius, 2013 WL 4781711 (D. Colo. Sept. 6, 2013) Granting Preliminary Injunction

Catholic Diocese of Biloxi, Inc., v. Sebelius, S.D. Mississippi No. 12-158 Motion to Dismiss Granted Dec. 26, 2012

Catholic Diocese of Nashville v. Sebelius, Injunction Pending Appeal Granted by Sixth Circuit on Dec. 31, 2013

Catholic Diocese of Peoria v. Sebelius, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013) Granting Motion to Dismiss

College of the Ozarks v. Sebelius, WD Mo., Case No. 12-cv-03428 Voluntarily dismissed without prejudice January 14, 2013.

Colorado Christian Univ. v. Sebelius, 2013 WL 93188 (D. Colo. Jan. 7, 2013) Granting Motion to Dismiss; Complaint renewed August 7, 2013

Conlon (Diocese of Joliet) v. Sebelius, 923 F. Supp. 2d 1126 (N.D. Ill. 2013) Granting Motion to Dismiss

The Criswell College v. Sebelius, N.D. of Texas Case No. 12-cv-04409 Granting Motion to Dismiss April 9, 2013

Diocese of Fort Wayne v. Sebelius, ND Ind. Case No. 12-cv-00159 Preliminary Injunction Granted Dec. 27, 2013

East Texas Baptist University and Houston Baptist University v. Sebelius, S.D. Texas, Case No. 12-cv-03009; Preliminary Injunction Granted Dec. 27, 2013

Eden Foods, Inc. v. Sebelius, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013) Denying TRO; Petition for Writ of Certiorari filed Nov. 13, 2013

Eternal Word Television Network, Inc. v. Sebelius, 935 F. Supp. 2d 1196 (N.D. Ala. 2013) Motion to Dismiss Granted; Complaint renewed Oct. 28, 2013

Franciscan Univ. of Steubenville v. Sebelius, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) Granting Motion to Dismiss.

Geneva College. v. Sebelius, 2013 WL 3071481 (W.D. Pa. June 18, 2013) Granting Preliminary Injunction

Gilardi v. Sebelius, 926 F. Supp. 2d 273 (D.D.C. 2013) Denying Preliminary Injunction; affirmed in part and reversed in part 733 F.3d 1208 (D.C. Cir. 2013)

Grace Schools v. Sebelius, N.D. Ind. Case No. 12-cv-459 Amended Complaint filed September 6, 2013; Preliminary Injunction granted Dec. 2013

Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013) Granting Injunction pending appeal

Hall v. Sebelius, District Court of Minnesota Case No. 13-0295, Unopposed Motion for Preliminary Injunction granted April 20, 2013

Hart Electric v. Dep't of Health and Human Servs., N.D. Ill. Case No. 13-cv-00253, Unopposed Motion for Preliminary Injunction granted April 18, 2013

Holland v. Dep't of Health & Human Servs., S.D. of W.V. filed June 24, 2013, Amended Complaint filed July 26, 2013, Motion to dismiss pending; stayed pending *Hobby Lobby* decision.

Infrastructure Alternatives v. Sebelius, W.D. of Michigan Case No. 13-cv-31 filed January 10, 2013 Dismissed Sept. 30, 2013

Johnson Welded Products, Inc. v. Sebelius, D.C. District Case No. 13-cv-00609 Unopposed Motion for Preliminary Injunction granted May 24, 2013

Korte v. Sebelius, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) Granting injunction pending appeal

Legatus (Weingartz) v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) Granting injunction to individual plaintiffs and denying injunction to corporate plaintiff.

Lindsay v. Dep't of Health and Human Servs., Northern District of Illinois Case No. 13 C 1210, Agreed Preliminary Injunction entered March 20, 2013

Little Sisters of the Poor v. Sebelius, Colo Dist. Case No. 13-cv-02611 filed September 24, 2013; Supreme Court granted Injunction Pending Appeal Dec. 31, 2013

Louisiana Coll. v. Sebelius, 2012 WL 3061500 (W.D. La. July 26, 2012) Denying as moot Motion to Dismiss following amendment of complaint. Being held in abeyance.

M&N Plastics v. Sebelius, E.D of Michigan Case No. 13-cv-12036, filed May 8, 2013, Voluntarily dismissed May 24, 2013

Mersino Mgmt. Co. v. Sebelius, 2013 WL 3546702 (E.D. Mich. July 11, 2013) Denying Preliminary Injunction

Midwest Fastener, Corporation v. Sebelius, D.C. District Court No. 13-cv-01337, filed September 5, 2013; Preliminary Injunction granted Oct. 16, 2013

MK Chambers Co. v. Dep't of Health & Human Servs., 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013) Denying Preliminary Injunction

Monaghan v. Sebelius, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013) Granting Preliminary Injunction

Nebraska ex rel. Bruning v. U.S. Dep't of Health & Human Servs., 877 F. Supp. 2d 777 (D. Neb. 2012) Granting Motion to Dismiss

Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) Granting Preliminary Injunction; decision affirmed 542 F. App'x 706 (10th Cir. 2013)

O'Brien v. HHS, 894 F. Supp. 2d 1149 (E.D. Mo.2012), Denying Preliminary Injunction Eighth Circuit No. 12-3357 oral argument October 24, 2013, awaiting decision, stay pending appeal granted Nov. 28, 2013

Ozinga v. Dep't. of Health and Human Servs., N.D. of Illinois Case No. 13-cv-3292, Unopposed Motion for Preliminary Junction granted July 16, 2013.

Persico (Diocese of Erie) v. Sebelius, Preliminary Injunction granted Nov. 21, 2013

Priests for Life v. Dep't. of Health and Human Servs. D.C. District court Case No. 13-cv-01261 filed August 19, 2013; Injunction Pending Appeal granted Dec. 31, 2013

The QC Group, Inc. v. Sebelius, District of Minnesota Case No. 13-1726, Second Amended Preliminary Injunction entered on September 10, 2013

Roman Catholic Diocese of Dallas v. Sebelius, 927 F. Supp. 2d 406 (N.D. Tex. 2013) Granting in part and denying in part Motion to Dismiss

Roman Catholic Diocese of Fort Worth v. Sebelius, N.D, Texas Case No 12-cv-00314 Amended Complaint filed August 22, 2013; Preliminary Injunction granted Dec. 30, 2013

Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 2d 310 (E.D.N.Y. 2012) Granting in part and denying in part Motion to Dismiss

Roman Catholic Archbishop of Washington v. Sebelius, 2013 WL 3357814 (D.C. Cir. June 21, 2013) Holding appeal in abeyance.

Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); Preliminary Injunction granted June 28, 2013

Sioux Chief Manufacturing Co. v. Sebelius, W.D. of Missouri Case No. 3-0036-CV-W-ODS, Unopposed Motion for Preliminary Injunction granted February 28, 2013.

SMA LLC v. Sebelius, Minnesota District Court Case No. 13-CV-01375, Unopposed Motion for Preliminary Injunction granted July 8, 2013.

Southern Nazarene University v. Sebelius, W.D Okla. Filed September 20, 2013; Preliminary Injunction granted Dec. 23, 2013

Tonn and Blank Construction, LLC v. Sebelius, N.D of Indiana, Case No. 1:12-CV-325 JD, Agreed Preliminary Injunction entered April 1, 2013

Triune Health Group, Inc., v. U.S. Dep't of Health & Human Servs., N.D. Ill. Case No. 12 C 6756 Preliminary Injunction granted January 3, 2013.

Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012) Preliminary Injunction granted, appeal dismissed, 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013)

Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014) (affirmed denial of Preliminary Injunction)

Wheaton Coll. v. Sebelius, 703 F.3d 551 (D.C. Cir. 2012) Appeals held in abeyance

Wieland v. Dep't of Health and Human Servs. E.D. of Mo. Case No. 13-cv-01577, filed August 14, 2013; case dismissed Oct. 16, 2013

Willis Law v. Sebelius, D.C. District Case No. 13-01124. Unopposed PI motion granted August 23, 2013.

Zubik v. Sebelius (Roman Catholic Diocese of Pittsburgh), 911 F. Supp. 2d 314 (W.D. Pa. 2012) Granting Motion to Dismiss

SUMMARY OF LIBERTY COUNSEL'S CHALLENGES TO SEXUAL ORIENTATION THERAPY BANS THROUGHOUT THE COUNTRY

Liberty Counsel has been at the forefront of the challenge to the homosexual activists' attempts to silence licensed mental health counselors who offer counseling on same-sex sexual attractions and behaviors from a religious perspective and address the client's sincerely held religious beliefs in that counseling. Homosexual activists throughout the country have been advocating for bans on so-called sexual orientation change efforts counseling ("SOCE"), and homosexual legislators have been introducing them in numerous state houses. Only two of those bans have successfully passed, California and New Jersey, and Liberty Counsel has led the charge to defeat these grossly unconstitutional laws. In both states, Liberty Counsel brought federal lawsuits against these SOCE prohibitions, alleging that they violate the First Amendment rights of counselors to provide and minors to receive SOCE counseling, the First Amendment

free exercise rights of the minor clients and their parents, and the First and Fourteenth Amendment rights of the parents to direct the upbringing and education of their children.

In California, Liberty Counsel filed suit on behalf of the American Association of Christian Counselors, the National Association for Research and Therapy of Homosexuality, two psychologists, two licensed marriage and family therapists, two minors currently receiving the counseling, and their parents challenging California Senate Bill 1172 (“SB1172”). SB1172 would compel mental health professionals, their minor clients, and their parents to terminate ongoing beneficial counseling or risk loss of professional licenses. One of the licensed professional counselors is a former homosexual who received SOCE counseling and was successfully able to eliminate his unwanted same-sex attractions. SB1172 requires that mental health professionals either violate their obligation to do no harm by withdrawing beneficial treatment or violate the law and face disciplinary action that places their livelihoods at risk.

The district court denied Liberty Counsel’s motion for a preliminary injunction against SB1172. *See Pickup, et al. v. Brown, et al.*, No. 2:12-CV-02497, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012). Immediately after that denial, Liberty Counsel sought an emergency injunction pending appeal from the United States Court of Appeals for the Ninth Circuit, which was granted prior to the law taking effect. *See Pickup v. Brown*, No. 12-17681, 2012 WL 6869637 (9th Cir. Dec. 21, 2012). The merits panel of the Ninth Circuit upheld the constitutionality of the law claiming it was a mere regulation of professional counselors and that it did not raise any First Amendment implications whatsoever. *See Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). Liberty Counsel immediately filed a petition for a rehearing *en banc*, requesting the entire Ninth Circuit to hear the case, but did not garner sufficient support from the court to have the case

reheard. However, the original panel issued a modified opinion, which drew a vigorous dissent from three of the judges claiming that SB1172 was wildly unconstitutional. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). Liberty Counsel immediately sought a stay pending the United States Supreme Court's review of its petition for a writ of certiorari, which was granted by the Ninth Circuit. The petition for a writ of certiorari is now pending before the Supreme Court.

In New Jersey, Liberty Counsel has brought two separate lawsuits challenging New Jersey's virtually identical law known as Assembly Bill 3371 ("A3371"). The first case was filed on behalf of the American Association of Christian Counselors, the National Association for Research and Therapy of Homosexuality, a licensed psychologist, and a licensed professional counselor. One of those counselors is a former lesbian who received SOCE counseling and was successfully able to eliminate her unwanted same-sex attractions. The district court denied Liberty Counsel's request for a temporary restraining order and ultimately denied their challenge on the merits, saying that A3371 was merely a professional regulation with no First Amendment implications whatsoever. *See King v. Christie*, No. 13-5038, 2013 WL 5970343 (D.N.J. Nov. 8, 2013). Liberty Counsel immediately appealed to the United States Court of Appeals for the Third Circuit requesting a preliminary injunction pending appeal and a substantive review of the district court's decision. To date, the Third Circuit has not yet ruled on the requested injunction pending appeal, and oral argument is scheduled for early July.

In the second suit challenging A3371, Liberty Counsel brought suit on behalf of parents and a minor who was receiving counseling from a licensed social worker who wanted to refer him to a licensed psychologist to receive additional counseling. A3371 prohibits them from receiving such counseling. In that case, the same district court judge who rejected Liberty

Counsel's challenge in the first suit has denied injunctive relief as well and stayed the case pending the Supreme Court's determination of the petition for a writ of certiorari in *Pickup v. Brown*. Liberty Counsel has also appealed that case to the Third Circuit. *See Doe v. Christie*, No. 14-1941 (3d Cir. 2014).

Liberty Counsel has also worked with legislators in Florida, Illinois, Maryland, Massachusetts, Minnesota, New York, Pennsylvania, Virginia, and Washington to defeat these efforts before they were enacted and has been successful in nearly all of them, with some still pending before various committees. It is also worth noting that the Republican Party of Texas has recently added a position supporting SOCE counseling to their party platform.⁹

SEXUAL ORIENTATION CHANGE EFFORTS

SB1172 and A3371 both prohibit any counsel of a minor *under any circumstances* to reduce or eliminate unwanted same-sex sexual attractions, behavior, or identity. Counselors may affirm but may not offer counsel, and clients may not receive counsel, to reduce or eliminate unwanted same-sex sexual attractions, behavior, or identity. The language of both bills is virtually identical, with only some minor variations. SB1172 states that “[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.” Cal. Bus. & Prof. Code § 865.1. SOCE counseling is defined as “any practices by mental health providers that seek to change an individual’s sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual

⁹ See Paul J. Weber & Will Weissert, *Texas GOP Advances ‘Reparative Therapy’ for Gays*, YahooNews (June 6, 2014), available at <http://news.yahoo.com/texas-gop-advances-reparative-therapy-gays-052641549--politics.html>

or romantic attractions or feelings towards individuals of the same sex.” Cal. Bus. & Prof. Code § 865(b)(1). However, SB1172 provides that

[s]exual orientation change efforts does not include psychotherapies that: (A) provide acceptance, support, and understanding of a clients or the facilitation of clients’ coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

Id. The language in New Jersey’s statutory SOCE prohibition mirrors that language with the exception of adding that “sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another.” N.J. Stat. Ann. §45:1-55

The proponents of these SOCE prohibitions trumpet the parade of horrors that their activists describe about their former counseling and construct a false image of what this modern mental health counseling entails. Most of these arguments reference aversive therapeutic techniques that have not been used by ethical and competent mental health professionals *in decades*. Yet, those who actually engage in SOCE counseling simply engage in the same type of client-centered “talk therapy” as every other form of modern mental health counseling. It is simply two people sitting in a room discussing the clients’ feelings, behaviors, desires, and goals, and for most SOCE counselors, helping the client to achieve their goal of conforming their attractions, behaviors, and identity to their sincerely held religious beliefs.

The primary source of support that proponents of these prohibitions rely upon is a 2009 Task Force Report issued by the American Psychological Association on SOCE counseling

(“APA Report”).¹⁰ All of the bills that have been introduced on this issue rely heavily on this Report to assert that SOCE counseling is harmful to those who receive it and that it has no scientific claim to credibility. This assertion, however, represents a fundamental misrepresentation of the studies concerning SOCE counseling and its efficacy, and it is a grossly inaccurate representation of the findings of the APA Report.

Indeed, the APA Report provides no justification for banning SOCE counseling or for alleging that it is harmful to children. The APA Report was admittedly inconclusive as to the efficacy of SOCE counseling. It found that there was anecdotal evidence of both lack of success and benefit, which is not at all dissimilar to all methods of modern mental health counseling.¹¹ The APA Report concluded that “given the limited amount of methodologically sound research, we *cannot draw a conclusion* regarding whether recent forms of SOCE are or are not effective.”¹² Yet, the only evidence of perceived harm was anecdotal.¹³ Most importantly, the APA Report provides no basis for a conclusion regarding the effect of this counseling on minors, as it noted that “sexual orientation issues in children are *virtually unexamined*.”¹⁴ Moreover, this inconclusive study recognized that “there is a dearth of scientifically sound research on the safety

¹⁰ Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009) *available at* <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

¹¹ *Id.* at 49-50.

¹² *Id.* at 43 (emphasis added).

¹³ *Id.* at 42.

¹⁴ *Id.* at 91 (emphasis added).

of SOCE,” and that “[e]arly and recent research studies provide *no clear indication of the prevalence of harmful outcomes.*”¹⁵

It is worth noting, too, that the mental health professionals assigned to the Task Force studying SOCE were all of a political persuasion against SOCE. Although many qualified conservative psychologists were nominated to serve on the Task Force, all of them were rejected. The director of the APA’s Lesbian, Gay and Bisexual Concerns Office, Clinton Anderson, offered the following defense: “We cannot take into account what are fundamentally negative religious perceptions of homosexuality—they don’t fit into our world view.”¹⁶ As is evidenced by this statement, the APA operated with a litmus test when considering Task Force membership—the only views of homosexuality that were tolerated are those that uniformly endorsed same-sex behavior as a moral good. As such, from the outset of the Task Force, it was predetermined that conservative or religious viewpoints would only be acceptable when they fit within their pre-existing worldview. One example of this is the APA Report’s failure to recommend any religious resources that adopt a traditional or conservative approach to addressing conflicts between religious beliefs and sexual orientation. Yet, even this group of ideological and biased participants could not reach a conclusive finding that SOCE counseling is harmful.

The American Psychological Association’s political position statement on this issue is also curious given its own admissions of the science behind homosexuality and same-sex

¹⁵ *Id.* at 42 (emphasis added).

¹⁶ *Psychologists to Review Stance on Gays*, USAToday (July 10, 2007), available at http://usatoday30.usatoday.com/news/health/2007-07-10-gays-psychologists_N.htm.

attractions. It is important to note in this regard that the APA's own stance on the biological origin of homosexuality has softened in recent years. In 1998, the APA appeared to support the theory that homosexuality is innate and people were simply "born that way": "There is considerable recent evidence to suggest that biology, including genetic or inborn hormonal factors, play a significant role in a person's sexuality."¹⁷ But in 2008, the APA described the matter differently:

*"There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles...."*¹⁸

Yet, the APA has made minimal effort to publicize the change in its official position on such causation or to correct the accompanying popular misconception – often promoted by the media – that persons with same-sex attractions are simply "born that way." It is difficult not to perceive this as significant professional neglect. Most notably, however, is the fact that the past president of the APA has noted the extraordinary success of this type of counseling. Dr. Nicolas Cummings personally saw *hundreds* of patients successfully reduce or eliminate their unwanted same-sex attractions.¹⁹

¹⁷ American Psychological Association, *Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality* (1998).

¹⁸ American Psychological Association, *Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality*, (2008), available at <http://www.apa.org/topics/lgbt/orientation.pdf>.

¹⁹ Nicholas A. Cummings, Ph.D., *Sexual Reorientation Therapy Not Unethical*, USA Today (July 30, 2013), available at <http://www.usatoday.com/story/opinion/2013/07/30/sexual-reorientation-therapy-not-unethical-column/2601159/>.

Additionally, the American College of Pediatricians has forcefully stated that “[t]he scientific literature, however, is clear: *Same-sex attractions are more fluid than fixed, especially for adolescents — many of whom can and do change.*”²⁰ The scientific evidence thus undercuts the ideological opposition of groups such as the American Psychological Association, which supports such overreaching legislation. Not only is such legislation unsupported by the evidence, but it would do affirmative harm to the very children it purports to protect: “Barring change therapy or SOCE will threaten the health and well-being of children wanting therapy. With no other options available, same-sex attracted young people will believe that they have no choice but to engage in homosexual behaviors. These behaviors place them at risk for grave physical and psychological harm.”²¹

SOCE PROHIBITIONS AND RELIGIOUS FREEDOM

The focus and aim of those who have targeted SOCE counseling, because of its message, and legislators’ principal reliance on those hostile to SOCE counseling for these laws reveal why these laws are a gross intrusion into the religious freedom of minors and their families. These laws aim to prevent any parent from raising their child consistent with their religious beliefs that homosexuality is unnatural, disordered, and sinful. Regardless of the First Amendment’s protection on the free exercise of religion, the proponents of SOCE prohibitions seek one thing only—the removal of any opposing view from the marketplace of ideas that does not wholly adopt their sinful and disordered lifestyle as a moral good.

²⁰ Press Release, *American College of Pediatricians, Legislators are Not Psychotherapists* (Jan. 27, 2014), available at <http://www.acped.org/legislators-are-not-psychotherapists> (emphasis added)

²¹ *Id.*

SOCE prohibitions unconstitutionally infringe on the First Amendment rights of parents and minors to seek counseling consistent with their sincerely held religious beliefs that change is possible and desirable. Minors are prohibited from receiving and parents are prohibited from assisting their children with receiving counseling consistent with their sincerely held religious beliefs and from directing the upbringing of their children in accordance with those beliefs. These laws impose a substantial burden on the religious beliefs of parents and minors because they have no options in seeking SOCE counseling from those *licensed* professionals who are best able and most experienced at providing such counseling. Instead, these individuals who desire such counseling are forced to elevate what the State has determined is an appropriate ideology over their own sincerely held religious beliefs about something as fundamental as their personal identity. *This is the very essence of a substantial burden on religion.*

The statements of many proponents of SOCE prohibitions make this very plain. Dr. Haldeman, a proponent of SOCE prohibitions and witness in the New Jersey litigation, has stated that “the codification of antigay attitudes on the part of powerful religious institutions invariably instills in some individuals profound discomfort with their sexual orientation.”²² The sentiments of Dr. Haldeman are echoed by others supportive of these prohibitions. Dr. Drescher, a member of the APA Task Force on SOCE, stated that

[s]ome significant contrasts between reparative therapists and DSM-V Workgroup members who treat gender variant children are that *none of the latter practice from a religious orientation*, their published works do not explicitly cite religious dogma, *they do not think homosexuality is a sin* or an illness, they do not think it is wrong to be gay, they do not see a gay outcome as a treatment failure, they do

²² Douglas Haldeman, *When sexual and religious orientation collide: Considerations for psychotherapy with conflicted gay men*, *The Counseling Psychologist*, 32(5), 691, 706 (2004), available at <http://www.drdoughaldeman.com/doc/WhenOrientationCollide.pdf> (emphasis added).

not call what they do reparative therapy, and they do not reference reparative therapy literature in support of their clinical approaches.”²³

Dr. Cummings, the past president of the APA, noted that many of the efforts in this area are political and ideological rather than having anything to do with science. Indeed, he stated that “the role of psychotherapy in sexual orientation change efforts has been politicized.”²⁴ He also noted that “[g]ay and lesbian rights activists appear to be convincing the public that homosexuality is one identical inherited characteristic. To my dismay, some in the organized mental health community seem to agree, including the American Psychological Association, though *I do not believe that view is supported by scientific evidence.*”²⁵ Most notably, however, he stated that “contending that all same-sex attraction is immutable is a *distortion of reality.* Attempting to characterize all sexual reorientation therapy as unethical violates patient choice and gives an outside party a veto over patients’ goals for their own treatment.”²⁶ He concluded that “[a] political agenda shouldn’t prevent gays and lesbians who desire to change from making their own decisions.”²⁷

Nevertheless, it is not merely the activist mental health professionals that reveal the true intentions of these laws. Many of the legislators sponsoring these efforts and introducing the bills into the various state houses are openly advocating for the suppression of religious freedom in

²³ Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, Arch. Sex. Behav. 39(2):427-60 (2010), available at <http://www.cpath.ca/wp-content/uploads/2009/08/DRESCHER.pdf> (emphasis added).

²⁴ See Cummings, *supra* note 10.

²⁵ *Id.* (emphasis added).

²⁶ *Id.* (emphasis added).

²⁷ *Id.*

this area. Even a mere sampling of the statements of those legislators who have introduced SOCE prohibitions reveals the ideological and political basis for these laws. Senator Lieu, who was the floor sponsor of the California legislation, stated that “[t]he attack on parental rights is exactly the whole point of the bill because we don’t want to let parents harm their children.”²⁸ Clearly, Senator Lieu and the proponents of this bill aimed at nothing more than prohibiting parents from instructing their children in their sincerely held religious beliefs concerning homosexuality. The sponsor of the Illinois ban, Representative Cassidy, stated that she was introducing the measure despite the fact that there “had *not* been a tremendous number of complaints about such therapy.”²⁹ She was essentially admitting that this is a solution without a problem. It is about ideological opposition to a viewpoint espoused in SOCE counseling. Other supporters of the proposed ban in Illinois further revealed its ideological basis, “[e]x-gay charlatans will come to the Illinois legislature with junk science and promises of love for LGBT kids, but their records show that their motivations are beyond insincere.”³⁰ The sponsor of Maryland’s attempted SOCE ban, Delegate Jon Cardin, stated that his reason for proposing the bill was that he finds the idea of ex-gay organizations or SOCE counseling to be “incredibly

²⁸ Kim Reyes, *Controversy Follows Efforts to Ban Gay Conversion Therapy*, Orange Cnty. Register (July 27, 2012), available at <http://www.ocregister.com/articles/therapy-365822-parents-orientation.html>; Jim Crogan, *California Law Barring Parents from “Curing” Gay Children Moves through Legislature*, FoxNews.com (Aug. 18, 2012), www.foxnews.com/politics/2012/08/18/California-law-barring-parents-from-curing-gay-children-moves-through/)

²⁹ Matt Simonette, *Conversion Therapy Ban Proposed for Illinois*, Windy City Times (Feb. 23, 2014), available at <http://www.windycitymediagroup.com/lgbt/Conversion-therapy-ban-proposed-for-Illinois/46338.html> (emphasis added).

³⁰ *Id.*

repulsive.”³¹ The sponsor of Virginia’s attempted SOCE prohibition, Delegate Patrick Hope, stated that his reason for proposing the bill was that “[c]onversion therapy is based on the false assumption that homosexuality is a sin . . . and it is not.”³²

As these quotations reveal, these laws are more about a clash of viewpoints and worldviews than about any ephemeral harm from SOCE, and such a clash takes direct aim at the religious beliefs of minors, their parents, and the counselors they seek. This clash of worldviews is precisely what the religion clauses of the First Amendment were intended to protect against. At their root, these SOCE prohibitions are an attack on the traditional religious teaching – shared by all the major world religions – that homosexual behavior is immoral (or “sinful”). Nevertheless, those traditional and deeply held religious convictions are protected by the First Amendment. These SOCE prohibitions impose a substantial burden on the religious beliefs of minors and their parents because it forces them to elevate what the State has determined is an appropriate ideology over their own sincerely held religious beliefs about something as fundamental as their personal identity and the protection and upbringing of their child. This is the very essence of a substantial burden on religion, and it represents the fundamental clash between religious freedom and these attempted efforts to prohibit SOCE counseling.

³¹ Michael K. Lavers, *Trans Rights Bill, Ex-Gay Therapy Ban Top Maryland Legislative Agenda*, Washington Blade (Jan. 8, 2014), available at <http://www.washingtonblade.com/2014/01/08/trans-rights-bill-ex-gay-therapy-ban-top-maryland-legislative-agenda/>.

³² Jessica Martinez, *Virginia Lawmaker Introduces Bill to Ban Reparative Gay Therapy for Minors, Says Homosexuality ‘Is Not a Sin’*, The Christian Post (Jan. 22, 2014), available at <http://www.christianpost.com/news/va-lawmaker-introduces-bill-to-ban-reparative-gay-therapy-for-minors-says-homosexuality-is-not-a-sin-113158/>.

ATTACKS ON NATURAL MARRIAGE AND FAMILY

The Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 1521 (2013), striking down Section 2 of the Defense of Marriage Act ("DOMA") has created a firestorm of activist assaults in nearly every state that recognizes the traditional and only definition of marriage. It has also resulted in a destruction of the rule of law by activist federal judges tripping over themselves to ignore principles of federalism, to trample the States' authority to define marriage in their jurisdictions, to ignore inherent biological truths concerning the perpetuation of the species, and to ignore the undeniable fact that children are raised best in a home with one father and one mother. Without precedent, and with an ever-alarming arrogance, many federal district courts have trampled the rule of law and the institution upon which society is built – the family. Without the institution of the traditional family, mankind cannot live on and prosper. It is clear that states have a fundamental interest in preserving and protecting that institution, but many activist judges have blatantly ignored scientific fact, sociological research, and common sense to invalidate numerous states' recognition of traditional marriage.

Statutes and constitutional amendments which define marriage as the union of one man and one woman are not, as those seeking to redefine the institution argue, laws that "ban same-sex marriage" or "discriminate against same-sex couples." Instead, constitutional and statutory provisions, such as those under consideration in these cases, simply memorialize the nature of a fundamental social institution. No governmental entity creates a "definition of marriage" by which certain subgroups are somehow discriminated against or through which those groups are denied "rights." Long before modern governments were formed, marriage was, and still is, a union of opposite sexes that is uniquely structured toward procreation and child-rearing and

therefore ensures the continuation of humankind and society. Only the union of a man and a woman can provide the biological, psychological, and sociological connections upon which a stable social structure can be built. By memorializing that unique relationship in the law and providing for certain obligations, responsibilities, and benefits, governments acknowledge that marriage, the comprehensive union of one man and one woman, is indispensable to the very future of society

Marriage between one man and one woman is a public good that is best for society, particularly its children and future generations. Forcing states to legalize same-sex marriage would equalize same-sex relations with marriage and parenthood. In doing so, marriage and parenthood would be severed, and the structure of children raised with a mom and a dad would suffer. It is one thing to tolerate personal relationships that are different from the traditional male-female relationship, but it is an entirely different thing for society to elevate such a relationship to a preferred status, and that is what these activist courts are doing across the country. The nation has never supported every conceivable combination of human relationships through law and policy. To the contrary, marriage has always been a national policy between one man and one woman, and forcing the states to change their laws to this activist norm ignores this indisputable history and common sense. As a policy matter, same-sex marriage promotes a dangerous notion that boys and girls do not need mothers and fathers. Same-sex marriage permanently deprives boys and girls of moms and dads. Research and common sense underscore the importance of moms and dads to the well-being of children.

EFFECTS OF SAME-SEX MARRIAGE, SEXUAL ORIENTATION, AND GENDER IDENTITY LAWS ON RELIGIOUS FREEDOM

The recognition of same-sex marriage, and laws including sexual orientation and gender identity, have also led to calamitous results in the social arena, whereby those who claim simply to want equality want nothing more than to impose their viewpoint on others who have religious beliefs opposed to their lifestyle choice. The end goal in this assault on the family and religious freedom is about silencing opposition and forcing those who disagree with a homosexual lifestyle and with the notion of same-sex marriage out of the marketplace for their beliefs. One need only see the stories of supporters of traditional and natural marriage to understand that this is nothing more than an attempt to impose a totalitarian regime designed solely to mandate recognition of a belief system diametrically opposed to society's understanding since time immemorial.

In a recent case in New Mexico, *Elaine Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013), a Christian photographer who owned a business was subjected to a human rights complaint for declining to exercise her talents and personal skills to lend her stamp of imprimatur on a same-sex wedding ceremony. The owner of Elaine Photography has sincerely held religious beliefs that marriage is a Biblical institution, ordained and holy to God that is solely between one man and one woman. When two women sought to employ her services for their same-sex "marriage" ceremony, the photographer informed them that she does not photograph *any image or event* that violates her sincerely held religious beliefs. The owner of Elaine Photography informed the homosexuals that she was certainly willing to provide services to them for any number of things, but that her sincere religious beliefs simply prohibited her

from providing services for a ceremony that violates her beliefs. The homosexuals filed a complaint with the New Mexico Human Rights Commission, arguing that she discriminated against them because of their sexual orientation.

The Elaine Photography case reached the New Mexico Supreme Court, which unbelievably affirmed the decision of the Human Rights Commission, stating that the business had no right to refuse services based on the owner's sincerely held religious beliefs. In a concurring opinion by one of the justices on the court, the inevitable collision of religious freedom and those forcing the homosexual agenda on others was made abundantly clear. Justice Bosson said that there is no doubt that individuals can be "compelled by law to compromise the very religious beliefs that inspire their lives," and that "[a]t its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others." *Id.* at 80 (Bosson, J., concurring). The collision course these activist judges and homosexuals have placed religious freedom on with the homosexual agenda is staggering, and this can only be expected to continue unless something is done to stem the tide of this totalitarian onslaught. The case was appealed to the Supreme Court of the United States, but they declined to review it.

Additionally, in Colorado, the owner of Masterpiece Cakeshop, Inc. was forced to compromise his religious beliefs by using his personal skills and talents to create a wedding cake for a same-sex marriage ceremony, which is fundamentally inconsistent with his sincerely held religious beliefs. *See Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc.*, CR 2013-

0008 (Col. Admin. Ct. 2013).³³ The owner informed the two homosexual men that he would be happy to provide his services for anything else they wanted, but that he could not place his personal stamp of imprimatur on their wedding ceremony by using his talents for their ceremony. The court stated that individuals were free to believe whatever they wanted about same-sex marriages but that they had no legitimate right to refuse to provide their personal services to ceremonies that they find religiously objectionable.

In Oregon, Sweet Cakes by Mellissa was similarly subjected to a civil rights complaint for merely following her sincerely held religious beliefs.³⁴ The Oregon Bureau of Labor and Industries investigated the religious business, and it held that the owners had violated Oregon civil rights laws by refusing to perform services for the same-sex wedding. The business has since closed its doors, being forced out of the marketplace simply for the exercise of their sincerely held religious beliefs.

In New Jersey, even a religious organization affiliated with the United Methodist Church was not safe from the attacks of the homosexual activist. In *Bernstein v. Ocean Grove Camp Meeting Association*, the group did not want to lease its facilities on a private boardwalk to two homosexuals wanting to host a same-sex “marriage” ceremony.³⁵ The religious organization explained that it did not rent the facility to homosexuals for same-sex marriages because the

³³ For a copy of the administrative court opinion in *Masterpiece Cakeshop*, see <https://www.aclu.org/lgbt-rights/charlie-craig-and-david-mullins-v-masterpiece-cakeshop> (last visited June 8, 2014).

³⁴ Everton Bailey, Jr., *Gresham Bakery Finding Buyers, Backers Amid Wedding Cake Controversy*, OregonLive (Jan. 20, 2014), available at http://www.oregonlive.com/gresham/index.ssf/2013/02/gresham_bakery_finding_buyers.html

³⁵ For the administrative law court’s opinion in *Ocean Grove*, see <http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf> (last visited June 8, 2014).

boardwalk was part of its wedding ministry and was therefore subject to the Scriptural doctrines on marriage. The New Jersey administrative law judge rejected this, saying that calling the religious organization's program a ministry does not suffice to evoke a religious mission. The organization was forced to rent the facility to homosexuals for their ceremony that was fundamentally at odds with the teaching of the Bible and the Methodist Church with which the group was affiliated.

Supporters of Proposition 8 in California, which passed by significant margins even in California, have also been tarnished, assaulted, and had their livelihoods destroyed for simply participating in or supporting the traditional definition of marriage. A recent prominent example is that of the Mozilla Chief Executive Officer being forced to resign for donating money to a campaign to defend traditional marriage in California.³⁶ Brendan Eich contributed \$1,000 in 2008 for the California marriage campaign, and when it was revealed in 2014, the homosexual activists once again revealed their intentions to eliminate any dissent whatsoever from the marketplace. The clash between the homosexual agenda and religious freedom could not be more clear than in these cases involving a totalitarian agenda to normalize homosexuality and ostracize anyone whose religious beliefs inform them otherwise.

In Massachusetts, after the court created a right to same-sex marriage out of whole cloth, the collision between religious freedom and the homosexual agenda reached another phase. The Catholic Charities of Boston, one of the oldest and most respected adoption agencies in the country, lost its state certification for refusing to provide adoption services to same-sex

³⁶ Alistar Barr, *Mozilla CEO Brendan Eich Steps Down*, Wall Street Journal (Apr. 3, 2014), available at <http://online.wsj.com/news/articles/SB10001424052702303532704579479741125367618>

couples.³⁷ The Commonwealth attempted to force the religious organization to place children in the homes of same-sex couples, and when Catholic Charities objected based on the teachings of their faith, they were denied certification and licensing to continue to provide adoption services.

While these examples are certainly illustrative of a serious problem, unfortunately this is just the tip of the iceberg of the assault on religious freedom. The list of attacks on religious individuals and organizations for their sincere religious convictions that homosexuality is unnatural and sinful is potentially limitless. That this is true is beyond peradventure. As the above cases make abundantly clear, it is also true that activists with an agenda will stop at nothing to drive any dissent out of the marketplace of ideas and out of the commercial marketplace. This is a zero sum game, and the implications for religious freedom are staggering.

It is imperative that Congress take decisive action to protect the religious freedom of individuals and organizations. The same-sex marriage, sexual orientation, and gender identity agenda is eroding the most cherished of all liberties – the right to live according to the dictates of one’s conscience without overbearing actions of the government.

I urge Congress to act to protect religious freedom. The time to act is now.

CASES INVOLVING SAME-SEX MARRIAGE POST-WINDSOR

Federal Cases:

Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Id. May 13, 2014)

Gray v. Orr, No. 13 C 8449, 2013 WL 6355918 (D. Ill. Dec. 5, 2013)

³⁷ *Boston Catholic Charities Stop Adoptions Because of Gay Parent Law*, FoxNews.com (Mar. 10, 2006), available at www.foxnews.com/story/03/10/boston-catholic-charities-stop-adoptions-because-gay-parent-law/ (last visited June 9, 2014).

Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ken. Mar. 19, 2014)

DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014)

Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014)

Obergefell v. Wymyslo, 962 F. Supp. 2s 968 (S.D. Ohio 2013)

Bishop v. Holder, 962 F. Supp. 2d 1252 (N.D. Okl. 2014)

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