NO. 23A-_____

IN THE
Supreme Court of the United States

STATE OF IDAHO,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CATHOLIC HEALTH CARE LEADERSHIP ALLIANCE, CATHOLIC BAR ASSOCIATION, AND CATHOLIC BENEFITS ASSOCIATION IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

Thomas Brejcha
B. Tyler Brooks
Counsel of Record
THOMAS MORE SOCIETY
309 W. Washington St., Suite 1250
Chicago, IL 60606
Telephone: (336) 707-8855
Facsimile: (312) 782-1887
tbrejcha@thomasmoresociety.org
tbrooks@thomasmoresociety.org
Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

INTERESTS OF THE *AMICI CURIAE*[1]

Amicus Curiae **Catholic Health Care Leadership Alliance** (CHCLA) is an alliance of Catholic organizations whose mission is to support the rights of patients and professionals to receive and provide health care in accordance with the moral, ethical, and social teachings of Jesus Christ and His Church through ongoing evangelization, education, advocacy, and mutual support. CHCLA's allied members include professionals involved in all areas of health care, including physicians and nurses, as well as practice groups and hospitals. CHCLA members are engaged in the active practice of health care on a daily basis, working in both secular and religious environments, and adhere to Catholic doctrine as their sincerely held religious beliefs. Its members collectively provide medical care to hundreds of thousands of patients across the country. CHCLA believes that the position taken by the United States will significantly impact: (1) the duty of health care providers in general to protect the life of an unborn child under EMTALA; (2) the ability of CHCLA members to practice medicine without being required or forced to perform intentional abortions as a treatment option under EMTALA, which is a violation of CHCLA members' conscience rights as practitioners of the Catholic faith; and (3) health care access for the underserved patients for whom CHCLA members provide care.

Amicus Curiae **Catholic Bar Association** (CBar) is a community of legal professionals that educates, organizes, and inspires its members to faithfully uphold

[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the brief; and no person other than these *amici*, their members, or their counsel contributed money intended to fund the brief.

and bear witness to the Catholic faith in the study and practice of law. It seeks to uphold the principles of the Catholic faith in the practice of law and assist the Church in communicating Catholic legal principles to the legal profession and society at large. This includes the principles of religious liberty and rights of conscience with respect to religious beliefs.

Amicus Curiae **Catholic Benefits Association** (CBA) is an Oklahoma non-profit limited cooperative association committed to assisting its Catholic employer members in providing health coverage to their employees consistent with Catholic values. The CBA provides such assistance through its website, training webinars, legal and practical advice for member employers, and litigation services protecting members' legal and conscience rights. The CBA's member employers include 78 Catholic dioceses, over 7000 parishes, over 1300 schools and colleges, as well as social services agencies, hospitals, senior housing, and closely held employers. One of the conditions for membership is that the member affirm its health care coverage complies with Catholic values.

SUMMARY OF ARGUMENT

Amici Curiae submit this brief in support of the State of Idaho's emergency motion for stay pending appeal or, in the alternative, a grant of certiorari before judgment. *Amici* argue that the United States' position disregards the duties and responsibilities owed by health care providers to an unborn child under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. To assert that abortion—which is the intentional termination of an unborn child's life—is permitted, or even required, under EMTALA is contrary to the unambiguous

text and intent of the statute. The United States' position that intentional abortion is required for emergency situations during pregnancy unnecessarily violates Catholic health care providers' conscience rights, in as much as the Catholic Church's ethical guidelines for treatment of pregnancy complications (including the complications cited by the United States) can be safely and ethically treated without intentionally terminating the life of an unborn child. These *amici*, therefore, offer this brief to help explain the significant impact of requiring intentional abortions by Catholic health care providers, who can provide safe and ethical treatment of all pregnancy complications without performing intentional abortions.

This case only arises because the U.S. Department of Health and Human Services (HHS), following an executive order from President Biden, directed the Centers for Medicare & Medicaid Services (CMS) to issue guidance regarding the provision of intentional abortions as a treatment option under EMTALA. The guidance memorandum issued by CMS, along with an email letter from HHS Secretary Xavier Becerra to all health care providers, stated that, in certain circumstances, intentional abortion is *required* in response to an emergent complication that arises during pregnancy. The United States' communications about the responsibilities under EMTALA fail to mention, at all, the concurrent responsibilities to the unborn child. Nor do they acknowledge that requiring an intentional abortion through EMTALA is contrary to the intent and unambiguous language of the statute to protect the health of the unborn child from serious jeopardy.

There is no Congressional authorization under EMTALA for HHS to require emergency departments to perform abortions. To the contrary, there are Congressional enactments clearly protecting the conscience and religious freedom rights of medical professionals and health care facilities to decline to participate in abortions. Furthermore, the United States' position requires health care providers to perform intentional abortions, a position that is directly contrary to the teachings of the Catholic faith. And, the United States has taken this position despite substantial evidence that all of the medical emergencies the United States has identified as reasons to purportedly justify intentional abortion under EMTALA can be safely and ethically treated without the intentional termination of an unborn child's life.

Further, the federal government's guidance from CMS is clearly intended to control how health care is administered and, it follows, to control the health care providers and require the health care providers to act in accordance with the guidance. Many of those providers, both individuals and entities, firmly adhere to the belief that human life begins at the moment of conception or fertilization. Even though federal statutory law protects these religious beliefs, the United States is attempting to improperly use EMTALA to override religious liberty protections and thereby force health care providers to perform abortions. This action on the part of the United States is in direct violation of federal statutory law and the U.S. Constitution.

Accordingly, *amici* respectfully support Idaho's request for a stay pending appeal.

ARGUMENT

I. AN UNBORN CHILD IS PROTECTED UNDER EMTALA, WHICH PRECLUDES INTENTIONAL ABORTION AS A TREATMENT, AND THE UPDATED GUIDANCE DIRECTLY CONTRADICTS EXISTING FEDERAL LAWS PROTECTING CONSCIENCE RIGHTS.

A. EMTALA Requires that Unborn Children be Protected, a Duty the United States' Updated Guidance Fails to Acknowledge.

The Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, provides no authority for the United States to coerce medical providers into performing abortions; *in fact, EMTALA requires medical providers to care for unborn children.* Specifically, EMTALA's plain language states that it protects the health of the "unborn child," just as it does the health of a pregnant woman, from being placed in "serious jeopardy." This duty arises in the context of an "emergency medical condition," which EMTALA defines as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in – (i) placing the health of the individual (or, *with respect to a pregnant woman, the health of the woman or her unborn child*) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part; or (B) with respect to a pregnant woman who is having contractions – (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or (ii) that *transfer may pose a threat to the health or safety of the woman or the unborn child.*

42 U.S.C. § 1395dd(e)(1)(A) (emphasis added).

Based on the very statutory definition of "emergency medical condition" in EMTALA, unborn children are a protected class under the statute. *Cf. Romine v. St.*

Joseph Health Sys., 541 F. App'x 614, 618 (6th Cir. 2014) (citing *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir. 1990)) ("EMTALA 'applies to any and all patients'"). Because an abortion of that unborn child would mean intentionally terminating his or her life and thus placing the unborn child's health in "serious jeopardy," in accordance with the statutory language of EMTALA, intentional abortion is necessarily prohibited.

The position of the United States then is entirely contrary to EMTALA's text, which unambiguously protects the life and health of an unborn child. The July 8 executive order by President Biden, however, discussed only the pregnant mother when it ordered HHS to rely on EMTALA as a means of increasing access to abortion and makes no mention whatsoever of the responsibility under EMTALA to the "unborn child." In his executive order, the President directed HHS to

> (iii) identify[] steps to ensure that all patients—including pregnant women and those experiencing pregnancy loss, such as miscarriages and ectopic pregnancies—receive the full protections for emergency medical care afforded under the law, including by considering updates to current guidance on obligations specific to emergency conditions and stabilizing care under the Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd, and providing data from the Department of Health and Human Services concerning implementation of these efforts.

Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 8, 2022).

On July 11, U.S. Department of Health & Human Services (HHS) Secretary Xavier Becerra issued a letter to health care providers outlining their duties under EMTALA. The letter states that, when a pregnant woman presents to an emergency department with an emergency medical condition and "abortion is the stabilizing

treatment necessary to resolve that condition, the physician must provide that treatment." Letter from Xavier Becerra, Secretary, U.S. Dep't of Health & Human Servs., to Health Care Providers (July 11, 2022), *available at* https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf (last visited Nov. 21, 2023). Secretary Becerra, however, never mentions in his letter the responsibilities of health care providers under EMTALA to the unborn child.

In the guidance memorandum issued by the Centers for Medicare & Medicaid Services (CMS) along with the Secretary's letter, mention of the duties owed to the unborn child is likewise totally omitted. The guidance (technically an update to a prior guidance memorandum) explains what constitutes an "emergency medical condition" or "EMC":

> An EMC includes medical conditions with acute symptoms of sufficient severity that, in the absence of immediate medical attention, could place the health of a person (including pregnant patients) in serious jeopardy, or result in a serious impairment or dysfunction of bodily functions or any bodily organ. Further, an emergency medical condition exists if the patient may not have enough time for a safe transfer to another facility, or if the transfer might pose a threat to the safety of the person.

Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss, (QSO-21-22-Hospitals-UPDATED JULY 2022), July 11, 2022, *available at* https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-

0 (last visited Nov. 21, 2023). The updated memorandum goes into further detail about "stabilizing treatment" and again only discusses duties to the "pregnant patient." As with the President and the Secretary, CMS makes no mention of the duties EMTALA imposes on providers to treat the "unborn child."

Taking these three documents together, a health care provider could read the materials (which purport to set forth the statutory duties and obligations under EMTALA when a pregnant woman presents for emergency treatment) and come away with no idea that EMTALA *requires* providers to protect the life and health of the unborn child and the mother alike. This is not guidance. This is misdirection.

Regardless of how much the President or Secretary may disagree with the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), it does not allow them to rewrite EMTALA's unambiguous terms to justify causing harm to an unborn child. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (if a "regulation is inconsistent with the statutory language . . . the regulation will not control"); *Ek Hong Djie v. Garland*, 39 F.4th 280, 284 (5th Cir. 2022) (citations omitted) ("To the extent a regulation attempts to carve out an exception from a clear statutory requirement, the regulation is invalid."). On these grounds alone, a stay pending appeal is justified since the plain language of EMTALA does not and cannot mandate performance of abortion.

B. The Updated Guidance Violates Federal Conscience Laws Specific to Health Care.

Outside of EMTALA, the specific Congressional intent relevant to this appeal is expressed through federal laws that clearly and unequivocally protect the conscience

and religious freedom rights of medical professionals, health care entities, and the public generally to decline to participate in or subsidize abortions.

The Church Amendments, 42 U.S.C. § 300a-7 *et seq.*, enacted in the 1970s, prohibit recipients of federal funds from discriminating against a health care provider who refuses to participate or assist in an abortion if doing so would be "contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d) & (e); *see id.* at § 300a-7(c). Made a part of federal HHS appropriations laws enacted since 1976, the Hyde Amendment is a law that restricts federal funding of abortion. "The most recently enacted version of the Hyde Amendment (P.L. 117-103. Div. H, §§ 506-507), applicable for fiscal year (FY) 2022, prohibits covered funds [from being] expended for any abortion or to provide health benefits coverage that includes abortion" other than in cases of rape, incest, or life of the mother. Edward C. Liu & Wen W. Shen, Congressional Research Service, *The Hyde Amendment: An Overview* (July 20, 2022), *available at* https://crsreports.congress.gov/product/pdf/IF/IF12167 (last visited Nov. 21, 2023); *see* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, Div. H., Tit. V, §§ 506-07; *cf. generally Harris v. McRae*, 448 U.S. 297 (1980) (upholding constitutionality of Hyde Amendment). The Weldon Amendment, which has been a part of every HHS appropriations act passed since 2005, expressly forbids the federal government from discriminating against any health care provider, facility, or plan on the basis that it does not provide, perform, or cover abortion. Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, Div. H., Tit. V, §§ 506-07; *see* Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat.

3034; *see also* 42 U.S.C. § 238n (Coats-Snowe Amendment of 1996) (prohibiting abortion-related discrimination in governmental activities regarding training and licensing of physicians). There is no conflict between EMTALA and the Weldon Amendment because the former does not require abortions, but if there were such a conflict, the Weldon amendment would govern because it is specific to abortion and enacted *after* EMTALA.

In repeatedly passing these federal conscience laws, Congress has acted *for decades* to protect the conscience and religious freedom rights of medical professionals and health care entities, to prohibit the federal government from subsidizing abortions, and to prohibit discrimination against medical professionals and health care entities on the basis of refusing to perform abortions. By purporting to use EMTALA to require individuals and entities to provide abortions, the United States has exceeded its statutory authority and acted contrary to the will of Congress under federal law.

II. REQUIRING ABORTIONS UNDER EMTALA HARMS CATHOLIC HEALTH CARE PROVIDERS, WHO HAVE LONG TREATED PREGNANCY EMERGENCIES WITHOUT INTENTIONAL ABORTION.

Catholic health care providers have an established record of providing safe and ethical treatment for pregnancy complications without resorting to abortion. Unlike the United States in its hastily issued guidance, the Catholic Church has taken great pains to define the term 'abortion' and set forth what is ethically acceptable medical treatment. The United States Conference of Catholic Bishops' *Ethical and Religious*

Directives for Catholic Health Care Services (ERDs) specifically defines what constitutes an abortion. Directive 45 of the ERDs states:

> Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion.

United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 18 (6th ed. 2018), *available at* https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06_0.pdf (last visited Nov. 21, 2023).

The ERDs also specifically give direction for those situations where there is a risk to the life of the mother and treatment of the mother will unintentionally cause the death of the unborn child; this treatment is justified and acceptable. Directive 47 of the ERDs states:

> Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.

Id. at 19. It is therefore entirely incorrect to assert or imply that the United States' guidance, with its policy of requiring providers to participate in voluntary abortions, is needed to ensure the lives of pregnant mothers are protected. *See, e.g.,* 157 Cong. Rec. 6877-78 (2011) (letters of physicians entered into record in support of legislation to protect the right of health care workers to refuse to participate in abortions and opining that intentional abortion is never medically necessary); *id.* at 6878 (letter of

John Thorp, M.D., of Univ. of N. Carolina School of Medicine, OB-GYN) ("I have not seen a situation where an emergent or even urgent abortion was needed to prevent a maternal death.").

A recent article in *Ethics & Medics*, published by the National Catholic Bioethics Center on Health Care and the Life Sciences (NCBC), discusses in detail issues concerning various pregnancy complications and how they can be properly treated without directly and intentionally terminating the life of the unborn child. John A. Di Camillo & Jozef D. Zalot, *Medical Interventions During Pregnancy in Light of* Dobbs, 47 Ethics & Medics (Aug. 2022), *available at* https://static1.squarespace.com/static/5e3ada1a6a2e8d6a131d1dcd/t/62fd2714a7bfe76313e74b48/1660757780241/E%26M_August_22_publish.pdf (last visited Nov. 21, 2023). The article specifically addresses the situations raised by the United States related to the emergency medical conditions under EMTALA involving pregnancy complications, including ectopic pregnancy, complications of pregnancy loss, and emergency hypertension disorders, all of which can be treated consistent with medical ethics and Catholic teachings without performing an intentional abortion. For example, as treatment for an ectopic pregnancy, the article identifies multiple options that are deemed by NCBC ethicists to be consistent with Catholic doctrine. *Id.* at 3. The article also dispels the myth that treating a miscarriage is somehow providing an abortion: "If an unborn child dies in utero, it is permissible to remove the remains through a surgical procedure . . . typically a dilation and curettage, [which] is the

same one used on living children in the case of elective abortions—but it is not a direct abortion when the child has already died[.]" *Id.* at 4.

Nonetheless, by mandating abortion as a treatment under EMTALA, the United States places Catholic health care providers in an unfortunately all too familiar position of being forced to fight against an abortion requirement that conflicts with their sincerely held religious beliefs. *E.g., Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 140 S. Ct. 2367 (2020) (long running legal dispute between Catholic women religious and states over exemption to contraception mandate). The federal Government has now created unnecessary confusion since everyone agrees that medical treatments to save the life of the mother that unintentionally cause the death of the unborn child are permitted. The confusion arises in that, despite there being treatment options for all pregnancy complications that do not involve abortion, the United States insist that health care providers uniformly have a duty under EMTALA to perform an intentional abortion. The United States' "update" to existing guidance is a violation of the rights of Catholic health care providers under federal conscience protection laws as well as the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb—statutes of which no analysis appears to have been performed by United States prior to requiring intentional abortion as a treatment option under EMTALA.

III. THE ABORTION MANDATE VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, was enacted to address the constraints on religious liberty jurisprudence created by

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which requires a comparator analysis to determine whether a law or regulation that purports to be neutral and generally applicable does in fact—either textually or by operation—"treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (cleaned up) (emphasis in original) (citing *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67-68 (2020) (*per curiam*)); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the *effect* of a law in its real operation is strong evidence of its object.") (emphasis added).

RFRA is intended to restore the pre-*Smith* standard for determining religious liberty violations: that a law or regulation imposing a substantial burden on the practice of religion as a condition to obtaining an important societal benefit must undergo strict scrutiny, which requires the government to demonstrate that (1) there is a compelling governmental interest justifying the burden and that (2) the challenged measure is narrowly tailored to achieve that interest. *Sherbert v. Verner*, 374 U.S. 398, 408 (1963); *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.,* 450 U.S. 707, 717-18 (1981). In *Thomas v. Review Board of Indiana*, the Supreme Court announced what is now the core of RFRA:

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

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest . . . [O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.

Id. (cleaned up)

Accordingly, as the Supreme Court has recently affirmed, RFRA provides "very broad protection[s] for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-94 (2014), which means "*greater protection* for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (emphasis added). "The question, then, is not whether [the government] has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception to [the Plaintiff]." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); *see U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 349 (5th Cir. 2022); *Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015); *Singh v. McHugh*, 109 F. Supp. 3d 72, 87 (D.D.C. 2016) (elements of Army's grooming and uniform policies substantially burdened cadet's religious beliefs).

Under RFRA, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person" furthers "a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b).

Moreover, RFRA protects "*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); 42 U.S.C. §

2000bb-2(4) (emphasis added). The "importance" of a religious belief is irrelevant. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1134, 1137 (10th Cir. 2013) ("substantial burden" relates to the degree of coercion applied by government, not the substantiality of the religious belief at issue, which would require an impermissible theological inquiry by the court). Courts must "focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). A "substantial burden" exists when government action rises above *de minimis* inconveniences and puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* (cleaned up).

There are indisputably pro-life individuals and entities in the healthcare field who are caught up in the sweep of the federal government's new mandate for abortion, but the United States did not even consider the rights of these medical providers. Yet, the new abortion mandate flunks the compelling interest/narrow tailoring inquiries as a matter of law.

First, under RFRA, to establish a compelling interest sufficient to withstand strict scrutiny, the Government may not merely recite "broadly formulated interests," but rather must survive "scrutin[y] [of] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). That has not been, and cannot be, done here.

Second, as to the actual existence of a compelling governmental interest, "officials cannot simply utter the magic words . . . and as a result receive unlimited deference." *Davila*, 777 F.3d at 1206 (citing *O Centro*, 546 U.S. at 438). In *Davila*, the Court listed a multitude of *situation-specific* evidence that could have helped its evaluation of compelling interest, such as historical incidents that justify the interest asserted and evidence of the effectiveness of other measures serving the same interest. Here, again, the United States did nothing to consider specific situations.

Third, RFRA's requirement that a compelling government interest must be established as to the *particular claimant* sets a "high bar." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring)). In *Little Sisters*, Justice Alito described that "high bar" thus: "In *Sherbert v. Verner* . . . the decision that provides the foundation for the rule codified in RFRA, we said that '[o]nly the gravest abuses, endangering paramount interest' could 'give occasion for [a] permissible limitation' on the free exercise of religion." *Id.* at 2392.

And, even if there were a compelling governmental interest at stake here, the United States cannot establish that its abortion mandate is the "least restrictive means" it could have employed to serve it. The "least-restrictive-means standard is exceptionally demanding" in that it requires the government to show "it lacks other means of achieving its desired goal." *Hobby Lobby*, 573 U.S. at 728. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. Under this standard, the United States must

"show that measures less restrictive of the First Amendment activity could not address [the] interest" to be advanced. *Tandon*, 141 S. Ct. at 1296-1297. This the United States cannot do.

Despite being fully cognizant of the fact that it was imposing an abortion mandate on a large group of providers, many of whom hold religious objections to participating in or facilitating abortion, the United States issued a "guidance" that uttered not one word about federally protected civil rights under RFRA.

CONCLUSION

For these reasons, these *amici curiae* respectfully ask the Court to stay the District Court's injunction pending appeal or, in the alternative, grant certiorari before judgment.

This the 21st day of November, 2023.

Respectfully submitted,

/s/ B. Tyler Brooks
Thomas Brejcha
B. Tyler Brooks
Counsel of Record
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1250
Chicago, IL 60606
Telephone: (336) 707-8855
Facsimile: (312) 782-1887
tbrejcha@thomasmoresociety.org
tbrooks@thomasmoresociety.org

Counsel for Amici Curiae