No. 13-354

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR NATIONAL RELIGIOUS BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE AMICUS[1]

The Amicus here, National Religious Broadcasters ("NRB"), is a nonprofit membership association with offices in Manassas, Virginia, and in Washington, D.C. It represents the interests of Christian broadcasters and communicators as well as allied organizations dedicated to related fields of endeavor. The President and CEO of NRB is Dr. Jerry A. Johnson.

NRB's membership includes religious nonprofit organizations and employers as well as closely-held, religious for-profit companies and employers. The rights of the latter are directly implicated by the issues in this case under the regulations promulgated by the Department of Health and Human Services ("HHS") in 45 C.F.R. § 147.130(a)(1)(iv) that require employers to provide employee health insurance coverage that includes services, drugs, and devices designed to disrupt pregnancy by preventing the uterine implantation of human embryos, sometimes referred to as "abortifacients" ("preventive care" or "preventive services"), all pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("ACA").

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[1] All parties have consented to the filing of this amicus brief. The government and Conestoga Wood Specialties Corp., et al. have consented to the filing of this amicus brief in letters of consent on file with the Clerk which consent to the filing of all amicus curiae briefs in support of either party or of neither party. Hobby Lobby Stores, Inc., et al. has consented to the filing of this amicus brief in a letter we have filed with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the amicus curiae provided any monetary contribution to its preparation or submission.

While we believe that the entire religious "exemption" scheme created by HHS fails to comply with the mandate from Congress for "comprehensive guidelines," including religious exemptions, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), nevertheless, regarding the precise issue here, namely, the free exercise of religion rights of closely-held, for-profit religious corporations and their owners, whether under the First Amendment of the U.S. Constitution, or under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2006), we believe that such rights should be recognized and vigorously protected. Accordingly we believe that *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) was correctly decided, and that *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services*, 724 F.3d 377 (3rd Cir. 2013) was not.

This case is a unique opportunity for this Court not only to vindicate the religious rights of Hobby Lobby Stores, Inc. ("Hobby Lobby"), Conestoga Wood Specialties Corp. ("Conestoga"), and their owners, but also to address the breadth of breathing room that should be accorded to religious freedoms when they are burdened by the increasingly complex tangle of federal regulations confronting 21st-century Americans.

SUMMARY OF THE ARGUMENT

The Court's decision in this case will not only affect the two faith-based, closely-held companies and their owners as well as NRB's for-profit members, but will also impact a broad swath of similar companies and their owners who have

religious objections to the "preventive care" provisions of the HHS mandate which implements the ACA. These objections spring from a Christian approach to the Bible, and specifically the New Testament, which commands that faith be integrated into one's work and business decisions. That approach flows from a theological belief that is as old as Christianity.

The status of the subject companies as for-profit corporations should not eclipse the fact that their owners, through those enterprises, should be able to fulfill their religious mission with the protections of free exercise of religion. From the earliest decisions of this Court it has been recognized that corporations are vested with constitutional rights, a fact noted in the decision of the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377, 383 (3rd Cir. 2013). However, the Court of Appeals erred by concluding that merely because no prior legal case has ruled on the availability of free exercise rights for closely-held corporations or their owners, that thereby, the "historic function" of free exercise must be interpreted as applying those rights only to *individuals*, and never to corporate businesses. The illogic of that position is evident: it would automatically foreclose to corporations any other constitutional rights from ever being recognized whenever the issue is one of first impression. Moreover, this Court has previously recognized religious freedom rights for corporations which are nonprofit. Thus, the ultimate question is whether the for-profit status of the two companies in this

litigation forecloses similar constitutional protection for them.

In early American history, not only did Founders like John Jay believe that religious free exercise belonged to religious corporations, but the historical evidence also shows us that the American culture at the time of the founding was permeated with religious beliefs that constrained the everyday decisions of citizens, which certainly would have included business decisions.

Moreover, it is an arbitrary and artificial distinction that would grant religious rights to individuals in a church corporation, but deny those same rights to religious individuals who completely control their closely-held, for-profit enterprises. In the same way, the reasoning of the Third Circuit would presumably grant religious rights to *individual* owners of solo-proprietorships regarding the HHS regulations at issue here, as well as to *individual* partners in a partnership, but not to *individual* owners of a closely-held, religious business.

Free exercise rights are implicated in this case. Unlike the claims of the Amish regarding the entire Social Security system in *United States v. Lee*, 455 U.S. 252 (1982), there is a simple legal algorithm that can be applied to distinguish the religious companies here from future religious complainants who might object to such things as our taxation system (a concern in *Lee*), or perhaps who oppose other controversial aspects of health insurance coverage mandated by the ACA. The history and ubiquity of the debate in America for forty years that

has pitted the beliefs of some religious adherents against the claims of others for abortion-related rights makes the free exercise context at issue here specific and discernible from other potential free exercise claims against the ACA or the HHS rules. If other claims are brought in the future by employers against objectionable medical services provided under mandated ACA health coverage, whether relating to immunizations or other services, they would certainly not share the unique historical context of the issue here.

That factor is also important in clarifying Congressional intent in its passage of RFRA. The *Congressional Record* contains numerous statements from both members of Congress as well as witness advocates in the hearings spanning the breadth of the ideological and philosophical spectrum, which illustrate that the free exercise rights contemplated in that law were intended, *inter alia*, to include the right *not to be compelled* by the government to be complicit in pregnancy disruption or termination services in violation of religious conscience.

The religious implications inherent in the intentional disruption or termination of pregnancy after conception were recognized in the earliest stages of this Court's consideration of *Roe v. Wade*, 410 U.S. 113 (1973), as well as in the Court's opinion itself. In no fewer than ten other decisions from this Court in the years subsequent to that, this Court has continued to recognize the unique religious aspects of that question. These facts provide an important background for the HHS regulations and the decision of the agency regulators to exclude religious for-profit employers entirely from the exemption

scheme, despite the overwhelming evidence that the "preventive care" coverage provisions mandated by HHS would collide with the long held and well-recognized religious objections like those advanced by Hobby Lobby, Conestoga, and their owners.

The HHS "religious exemption" scheme therefore constitutes an arbitrary "religious gerrymander," apparently designed to minimize the number of religious exemptions in violation of the holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This is shown by an evaluation of the regulatory structure of the entire HHS religious exemption scheme which generally creates an insufficient protection for the free exercise rights of religious employers. The facial exclusion of for-profit religious employers from any exemption protection was coupled in that regulation with the provision of an exemption *only* applicable, under 45 C.F.R. § 147.131(a), to nonprofit churches or church-related entities, as the government notes; all other nonprofit religious employers are merely given the option of an "accommodation" where they would still be forced to provide the objected-to preventive care services coverage while merely avoiding having to pay specifically for coverage relating to those services.

It is also clear that the HHS exemption guidelines, specifically providing that some religious corporations can qualify, and some cannot, therefore fails to be "religion neutral," under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Accordingly, a full free exercise of religion analysis must be entertained regarding the religious claims of the two companies.

In so doing, because those regulations make classifications based on religion, this Court must subject those rules to strict scrutiny, particularly because the rules themselves categorically deny to for-profit, closely-held religious employers, any consideration for exemption despite the extreme hardship imposed on those employers.

In addressing the substantial burden placed on the religious free exercise of Hobby Lobby and Conestoga, it is important to note that the HHS provisions that would "grandfather" certain pre-existing health insurance plans actually provide little protection for employers, including religious ones. In fact, the government concedes that the intent was to provide only a temporary grandfathering of existing plans during the implementation of the ACA. Petition for Writ of Certiorari at 30, *Sebelius v. Hobby Lobby Stores, Inc.,* No. 13-354.

The religious burden in this action is substantial because religious employers who believe that it is essential to honor their faith-based conscience, an exercise for which the Founders desired the highest form of protection, are forced to choose between conscience and devastating fines. The burden here is in one aspect greater than that recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), because unlike the Amish there, the regulation here is federal; thus, the religious companies do not have the option of relocating to a more "tolerant" state to avoid being complicit in practices that violate the doctrines of the owners' deeply held faith. As in *Yoder*, the government in

this case does not question the sincerity of the religious beliefs at issue.

The government argues that the exercise of the employers' religious beliefs is too attenuated from the ultimate medical decisions of third party women employees to warrant protection, and that the real issue is the rights of those employees rather than the free exercise rights of the religious employers. However, a similar point was made by Justice Douglas in his dissent in the *Yoder* decision, an argument that was rejected by the Court's majority. Nor is it relevant that, as the government has argued, medical confidentiality will prevent employers from knowing the specifics of employees' use of preventive care coverage to halt a pregnancy: the depth of religious conviction is not nullified by such a simplistic "see no evil" approach.

Last, the government predicts that a short litany of abuses could occur if the religious rights of the employers here are vindicated, including such things as future religious objections from employers to immunizations and blood transfusions. However, whatever the nature of future objections might be, they most certainly would not involve the same type of burden on religious rights of conscience which is asserted in this action, particularly in view of the ubiquity and history that attaches to the legal and religious context of that issue.

ARGUMENT

I. THE NATURE OF FAITH-BASED COMPANIES IMPACTED BY THIS CASE

A. The Diversity of Faith-Based Companies

The membership of National Religious Broadcasters ("NRB") illustrates the broad diversity of faith-based, for-profit companies that are impacted by this case. In addition to NRB inclusion of nonprofit Christian ministries, we also count among our membership a diverse number of faith-based, closely-held, for-profit companies that are engaged in a variety of Christian communications, or allied fields. These include: healthcare organizations, evangelistic endeavors, communications equipment and software suppliers, individual speakers, authors and artists, Internet services and Internet video and audio platforms, law firms, marketing companies, agencies supplying media services, media production companies, Christian publishers, radio and television stations and networks, companies providing religious-themed tours, and telemarketing call centers.

These evangelical, closely-held, for-profit corporations provide a variety of services exclusively to Christian nonprofit ministries, such as advertising services, media and program consulting, and they not only refrain from working with any project that would facilitate or promote the intentional termination of pregnancy after conception, but also support pro-life organizations financially, and offer free-of-charge volunteer services to such groups, all as an extension of the belief that the Bible teaches

that God is the Author of life, and that as a result, from conception onward, life in the womb is sacred. Furthermore, almost all of them provide health insurance plans for their employees, and up to now have made a concerted effort, based on their evangelical faith, to exclude from insurance coverage the types of services that the current HHS guidelines now require under the rubric of "preventive" health care services for women.

The religious missions of Hobby Lobby and Conestoga as closely-held companies and the faith basis of NRB's for-profit members are not unique. On a national scale there is a wide diversity of for-profit, closely-held, religious corporations including, just to name a few: fast-food chains In-N-Out Burger and Chick-fil-A, trucking company Covenant Transport, retail clothing store line Forever 21, and Tyson's foods.[2]

The common thread that binds the two companies in this litigation to NRB's for-profit members, as well as to the other companies mentioned above, is the shared belief that the Bible is a trustworthy and inspired guide for belief and

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[2] Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, newyorktimes.com (Aug. 2, 2013), http://www.nytimes.com/2013/08/03/us/at-christian-companies-religious-principles-complement-business-practices.html?_r=0. Chick-fil-A "supports group foster homes," Tyson's foods "offers chaplaincy services to employees," "Forever 21 prints 'John 3:16' on the bottom of its shopping bags," "Covenant Transport . . . wears its Christianity on the side of its trucks," and "[t]he Bible verses on In-N-Out Burger milkshake cups, burger bags and other packaging are quite fun, even for an atheist. The verses are tiny and varied, so you have to hunt and see what turns up." *Id.*

conduct. Accordingly, faith becomes an integral part of life for such corporate owners and it therefore influences decisions made in a business setting. For such owners, one's vocational calling is "the full expression of the worker's gifts . . . the medium in which he offers himself to God."[3] The Christian is given the mandate: "So, whether you eat or drink or whatever you do," the Apostle Paul urged, "do it all for the glory of God." *I Corinthians* 10:31. "Whatever you do, work at it with all your heart, as working for the Lord, and not for men, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Jesus you are serving." *Colossians* 3:23-24.

The sincerely held religious position of Hobby Lobby and Conestoga through their owners that religious faith must be integrated into business decisions, is consistent with the position of NRB for-profit members, and it is mirrored by faith-based companies around the nation. As we have shown above, it flows from a theological doctrine that is as old as Christianity.

B. Corporate Fiction vs. Religious Fact

The corporate status of a closely-held business, as a legal fiction, should not eclipse the seminal fact here: closely-held, for-profit employers that are faith-based can be, and often are, the instruments for, and conduits of, the religious mission and beliefs of the owners, and as such, are

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[3] Hugh Whelchel, *How Then Should We Work – Rediscovering the Biblical Doctrine of Work* 77 (WestBow Press 2012) quoting Dorothy L. Sayers, *Creed or Chaos?* 134-35 (Sophia Institute Press 1974).

entitled to free exercise protection. The Third Circuit, in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377, 383 (3rd Cir. 2013) ("*Conestoga*"), noted that this Court has recognized that "'a wide variety of constitutional rights may be asserted by corporations,'" quoting *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 347 (2d Cir. 2002). The court in *Conestoga*, quoting from *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), held that the question of whether a given constitutional right accrues to a corporate entity is to be determined by *exclusion*: in other words, the particular right should be denied if the constitutional guarantee in question is found to be "purely personal . . . because the historic function of the particular guarantee has been limited to the protection of *individuals*." *Conestoga*, 724 F.3d at 383 (emphasis added) (internal quotation marks omitted).

But thereafter, the *Conestoga* court erred remarkably by looking at the history of court decisions, finding none that have extended free exercise of religion rights to religiously based, closely-held, for-profit corporations, and concluded that religious liberty must be only a "purely personal" right. Respectfully, such an assertion cannot possibly be correct. First, taken to its most illogical extreme, that would create a nonsensical approach to questions of first impression, requiring this Court to conclude, as an empty tautology, that any purported right of first impression must always be denied to corporate entities because such matters are, after all, issues of first impression.

Second, if the *Conestoga* court meant to say that religious rights of organizations (as opposed to *individuals*) have never been recognized, surely that equally remarkable assertion cannot—and is not—true. We need only recall, in the recent term of this Court, where the religious liberty rights of an institution—a religious school—were vindicated. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. __, 132 S. Ct. 694 (2012). Moreover, the position of the government in this case would undoubtedly have come as a shock to John Jay, co-author of the *Federalist Papers*, and the first Chief Justice of this Court. As the president of the American Bible Society, Jay noted the "zeal . . . [that had] occasioned the establishment of institutions well calculated to diffuse the knowledge and impress the precepts of the Gospel both at home and abroad."[4] In his address at the annual meeting of the Society in 1824, Jay went on to recognize the religious liberty rights that such religious institutions and corporate organizations enjoyed:

> We have reason to rejoice that such institutions have been so greatly multiplied and cherished in the United States; especially as a kind Providence has blessed us not only with peace and plenty, but also with the full and secure enjoyment of our civil and religious rights and privileges.[5]

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[4] Address of the Hon. John Jay, President of the American Bible Society, read at the Eighth Annual Meeting, May 13, 1824 *in* 1 *Annual Reports of the American Bible Society* app. to Eighth Report at 285 (New York: American Bible Society 1838), *available at* www.books.google.com/books?id=cqVVAAAAYAAJ.

[5] *Id.* at 285.

However, at the time of the Founding, the idea of religious zeal was not relegated just to formal, religious institutions like the American Bible Society. Indeed, religious faith was integrated into the affairs of everyday life of commoners as well. The *Conestoga* court, if it meant to imply that only formal, *nonprofit* religious organizations were envisioned by the Founders as possessing religious liberty rights, then it missed a significant part of American history. Alexis de Tocqueville's travels through America in the first half of the 19th century and the subsequent compendium of his personal observations bears this out, beginning with the common understanding among early Americans that faith should be vibrant and pervasive and that the concepts of religious belief and religious liberty were joined at the hip:

> The Americans combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other; and with them this conviction does not spring from that barren, traditionary faith which seems to vegetate rather than to live in the soul.[6]

Tocqueville goes on to write at that time of the powerful restraining force that faith exercised on the conduct, not just of clergy, but on the American culture at large:

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[6] 1 Alexis de Tocqueville, *Democracy in America* 317 (Phillips Bradley, ed., New York: Random House 1945).

> Hitherto no one in the United States has dared to advance the maxim that everything is permissible for the interests of society, an impious adage which seems to have been invented in an age of freedom to shelter all future tyrants. Thus, while the law permits the Americans to do what they please, *religion* prevents them from conceiving, and *forbids them to commit*, what is rash or unjust.[7]

The fact that some Americans, or even many of them, no longer integrate a Bible-centered, Christian worldview into their everyday lives does not change the fact that the owners of Hobby Lobby and Conestoga, as well as many others who operate closely-held companies, still do. The restraining force of religious conscience upon the practical, business decisions and actions of the owners of Hobby Lobby and Conestoga is in keeping with the earliest American experience, and must surely be deemed to be part of the "historical function" of the guarantee of free exercise, going back to the Founding, contrary to what the *Conestoga* court has decided.

We must wonder how the court's fixation on the corporate form of the Conestoga company, as an example, would translate to the situation of a non-corporate, solo-proprietorship business, operated by a person of faith who employs staff and is subject to the ACA's "preventive care" mandate and who holds similar religious objections to being complicit in the providing of pregnancy termination services to

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[7] *Id.* at 316 (emphasis added).

employees. Such an employer would clearly be an "individual," and, under the Third Circuit's reasoning, would qualify for free exercise protection. Yet the functional difference between that person and the owners of Hobby Lobby or Conestoga for purposes of their control over their faith-based business is non-existent. The same could be said of a two or three person partnership comprised of owners who possess an identical religious persuasion. Surely, it would *not* be logical to grant them free exercise rights, but at the same time deny such rights to the two closely-held companies in this case.

II. FREE EXERCISE RIGHTS ARE IMPLICATED HERE

A. Distinguishing the *Lee* Case

In this brief, unless specifically indicated otherwise, we use the phrase "free exercise rights," or "free exercise of religion," to refer collectively to those rights protected by the Free Exercise Clause of the First Amendment, U.S. Const. amend. I, as well as the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1 (2006). We believe this is appropriate, given the fact that RFRA "was enacted to reestablish a constitutional test with the expectation that courts would look to constitutional precedent for guidance." *Village of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006).

The free exercise rights that should be recognized for Hobby Lobby and Conestoga here, can be distinguished from the concerns that were the basis of this Court's decision, for instance, in *United States v. Lee*, 455 U.S. 252 (1982) (prohibiting Amish

objectors, under the Free Exercise Clause, from opting-out of the Social Security system). This Court, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), explained that the rationale in *Lee* was based on the Court's inability to distinguish (or the claimants' failure to convincingly distinguish) the claims of the Amish in that case from a multitude of other potential religious objections that might arise against taxation generally or against the Social Security system in particular if free exercise rights were recognized under those conditions. The result, this Court pointed out, could cause massive dysfunction to our entire taxation structure:

> Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States v. Lee* . . . . There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There *would be no way*, we observed, *to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have* to the collection or use of other taxes." [also citing *United States v. Lee*, where this Court predicted that by allowing similar religious-based tax

> protestations, "[t]he tax system could not function . . . ." *Lee*, *supra* at 260.] (emphasis added).

Smith, at 880. By contrast, there is a "way . . . to distinguish," for free exercise purposes, the specific claims of Hobby Lobby and Conestoga in this case, from any number of hypothetical, religious-based objections of employers that might arise in the future, whether opposing such things as immunizations, or a range of other medical services. The unique history and ubiquity, over the last four decades, of consistent religious objections since *Roe v. Wade*, 410 U.S. 113 (1973), to medical services designed to intentionally terminate pregnancies after conception, is just such a distinction.

This is important in two ways. First, it addresses the scope of RFRA itself. During the debates over that legislation, Congress was fully aware of the debate dynamic in this country, roughly framed as abortion rights vs. religious objections. It is reasonable to conclude that Congress intended that such objections based on religious conscience—including those in this case—would be subsumed within the rights recognized in RFRA, particularly if, as here, a religious employer is being compelled to facilitate the provision of services to employees in violation of sincerely held religious beliefs. The evidence in the *Congressional Record* is replete with examples to support that conclusion.[8]

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[8] An online search of the word "abortion" in the September 18, 1992 hearings in the Senate on RFRA, turns up 613 results. While not all references relate to the context we are discussing above, some do, and they come from a bevy of bipartisan, and ideologically diverse voices. In the House of Representatives

Thus, it is baseless to argue, as the government has here, that the position of Hobby Lobby and Conestoga "would transform RFRA from a

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hearings on May 13 and 14, 1992, there are 890 references to "abortion." Nadine Strossen, president of the ACLU, testified:

> And going to the abortion issue, Congressman Hyde, of course this legislation is completely neutral on the abortion issue. All it does is restore religious liberty, freedom of conscience, and I think that is a liberty that can enhance the rights and in many situations *will enhance the rights of those who conscientiously and religiously are opposed to abortion*. . . . This law would give them a defense based on religious freedom.

Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 102nd Cong. 100 (1992) (statement of Nadine Strossen, President, National Board of Directors, ACLU) (emphasis added). Rep. Steny Hoyer asserted: "Since Smith, more than 50 cases have been decided against religious claimants," and further adding that "one Catholic teaching hospital lost its accreditation for refusing to provide abortion services." 139 Cong. Rec. H2356, 2361 (daily ed. May 11, 1993) (statement of Rep. Hoyer). In the Senate hearings, similar observations where made by law professors: "Pro-life doctors and nurses and even whole hospitals are being forced out of obstetrics and gynecology. That is real, and RFRA would protect those people." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Committee on the Judiciary*, 102nd Cong. 87 (1992) (Prepared statement of Douglas Laycock, Professor of Law, The University of Texas). Other witnesses corroborated those opinions: "The likely outcome of a case under the RFRA would be to grant a religious pro-life medical worker protection from compelled participation in abortion." *Id.* at 149 (statement of Michael P. Farris, Esq., President, Home School Legal Defense Association).

shield for individuals and religious institutions into a sword used to deny employees of for-profit commercial enterprises the benefits and protections of generally applicable laws" regarding women's preventive health services. Petition for Writ of Certiorari at 16, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 ("Gov't Pet."). Congress was aware that RFRA would provide a shield for persons and entities having faith-based objections to being compelled to participate in the provision of pregnancy termination services. As a result, such female employees desiring those services need only obtain their own private coverage. Employee inconvenience falls far short of being cornered at "sword" point; indeed, it is Hobby Lobby and Conestoga, not their employees, that are faced with the menacing, steely thrust of government regulations.

Second, the unique history of the religious objection versus pregnancy termination issue illuminates the contextual circumstances behind the HHS guidelines themselves, and shows them to have effected a "religious gerrymander," something we discuss below.

In the past forty years there has been a consistent recognition by this Court that medical practices designed for the intentional termination of a pregnancy after conception and before birth raise religious questions, and have engendered faith-based objections by members of the American public. As such, the historical context of this particular question as applied to the HHS mandate, and the nature of the religious objections of Hobby Lobby and

Conestoga, create a highly unique and specific basis for the free exercise rights asserted here.

Official recognition that procedures and services intended to disrupt a pregnancy raise religious implications appears in the early stages of this Court's consideration of *Roe v. Wade*. During the oral re-arguments in *Roe*, Justice Stewart addressed the nature of the issue, asking: "Now, how should that question be decided? Is it a legal question? A constitutional question? A medical question? A philosophical question? Or, a religious question?"[9]

The Court's opinion in *Roe v. Wade* addressed various religious viewpoints that bore on the societal interests implicit in the abortion question. The decision addressed the beliefs of "[a]ncient religion," *Id.* at 130 (footnote omitted); "[t]he emerging teachings of Christianity," *Id.* at 132; "Christian theology and the canon law," *Id.* at 34; "[t]he theological debate . . . reflected in the writings of St. Augustine," as well as the views of the "early Christian thinkers," *Id.* at 134 n.22; "the predominant . . . attitude of the Jewish faith," *Id.* at 160 (footnote omitted); and "official Roman Catholic dogma" and the "official belief of the Catholic Church," *Id.* at 160-61 (footnote omitted).

And, of course, in the years that followed, a myriad number of cases decided by this Court noted the intersection between pregnancy termination and

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[9] Transcript, Oral Reargument at 11, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), *available at* http://www.scribd.com/doc/68497271/Transcript-Roe-v-Wade-Re-Argument-Oct-1972).

the religious objections of those who do not approve of such procedures.[10]

In view of the unbroken history of such on-going religious objections by a segment of the American public, the regulators in the Department of Health and Human Services cannot claim to be unaware of the religious implications of the preventive services portion of the health insurance mandate. Indeed, the mere fact that a religious

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[10] *Hill v. Colo.*, 530 U.S. 703, 763 (2000) (Scalia, J., dissenting) (recognizing the potential for religious objections to abortion); *Planned Parenthood v. Casey*, 505 U.S. 833, 899-900 (1992) (acknowledging that parents could want to discuss religious principles of abortion with a pregnant daughter); *Hodgson v. Minn.*, 497 U.S. 417, 448 (1990) (acknowledging that a waiting period gives parents time to discuss religious implications of abortion with a pregnant daughter); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 541-42 (1990) (Blackmun, J., dissenting) (contemplating the potential for legislatures to have religious reasons for making abortions difficult to obtain); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 571 (1989) (Stevens, J., concurring in part and dissenting in part) (acknowledging existence of deeply held religious beliefs related to the abortion debate); *Bowen v. Kendrick*, 487 U.S. 589, 640 n.9 (1988) (Blackmun, J., dissenting) (asserting that religious beliefs would influence adolescent sexuality and pregnancy counseling administered by religious organizations); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring) (noting the religious view that a fetus is a person); *H. L. v. Matheson*, 450 U.S. 398, 409 (1981) (recognizing the existence of religious concerns over abortion); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (acknowledging that religious doctrines address abortion); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (recognizing that abortion raises religious concerns).

exemption was attempted as part of the HHS regulations indicates that the agency knew the religious sensitivity of the issue. Knowing that, however, HHS still excluded by definition, for-profit religious employers. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B)(4); *see also* 45 C.F.R. § 147.131(a) and § 147.130(b)(2). Thus, the actions of HHS arbitrarily reduced considerably the field of potential religious employers eligible for exemption.

When it comes to analyzing government regulations through the prism of free exercise rights, whether under RFRA, or the First Amendment, "[f]acial neutrality [of the regulation] is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). As we have noted above, the fact of a religious exemption of sorts contained in the HHS rules, which categorically excludes for-profit religious organizations, and carefully limits the kinds of nonprofit religious entities that can qualify, disproves that the ACA satisfies "facial neutrality" regarding religion. But even if that were not so, the HHS guidelines effect a kind of *religious gerrymander*, by expressly disfavoring religious for-profit entities, while exempting some, though most certainly not exempting all or even most, nonprofit ones. "'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Id.* (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

This Court has recognized that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness*

v. Fortson, 403 U.S. 431, 442 (1971). The basis for free exercise relief for Hobby Lobby and Conestoga in this case, is substantially different from that urged by the complainants in *Lee.* The failure to treat the cases differently would result in a grossly unfair infringement of the religious liberties of those two religious corporations.

Last, the recognition of free exercise rights for Hobby Lobby and Conestoga here will surely have none of the devastating, universal impacts envisioned by this Court in *Lee*. There will be no wholesale dysfunction caused to the ACA; rather, closely-held, for-profit religious employers would merely be protected in addition to the limited number of nonprofit religious employers currently exempt under the inadequate exemption that has been made available for religious organizations.[11]

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[11] The insufficiency of the religious exemption is illustrated by the fact that 45 C.F.R. § 147.130(a)(1)(iv)(B) not only defines "religious employer" as one that has religious purposes, and primarily employs persons of the same faith, and is a nonprofit corporation under the Internal Revenue Code, but it also must be one that "serves primarily persons who share the religious tenets of the organization." That last caveat would exclude most, if not virtually all of the nonprofit religious organizations within National Religious Broadcasters, as they are, as the foreword to our organizational Constitution declares, concerned for the spread of the Gospel of our Lord and Savior Jesus Christ, a mission that sends them into the world with the mandate to serve communities and to spread the Gospel to those who in fact may not "share [their] religious tenets;" in fact, very often that mission, whether by proclamation or by acts of public service, is directed toward persons who are non-adherents to the "evangelical" beliefs of our members. It should be noted, however, that 45 C.F.R. § 147.131 appears, curiously, to create a new set of qualifying factors for a "religious employer." *See* 45 C.F.R. § 147.131(a) and § 147.131(b), while

Such a result would not remove any of those employers entirely from the reach of the ACA, but would only protect them from one small portion of the Act, namely, the provision requiring preventive services coverage.

B. Strict Scrutiny for Classifications "Based on Religion"

The HHS guidelines at issue here call for this Court to evaluate those regulations pursuant to a strict scrutiny standard, requiring them to be justified, if at all, under a compelling-interest test, whether pursuant to RFRA or the Free Exercise Clause. In *Smith*, this Court noted those categories of government classifications sufficiently suspect so as to invoke strict scrutiny, stating:

> Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore v. Sidoti, 466 U.S. 429 (1984)*, or on the content of speech, see *Sable Communications of California v. FCC, 492 U.S. 115 (1989)*, so too we strictly scrutinize governmental classifications *based on religion*, see *McDaniel v. Paty, 435 U.S. 618 (1978)*; see also *Torcaso v. Watkins, 367 U.S. 488 (1961)*.

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still incorporating by reference § 147.130(a)(1)(iv). *See* 45 C.F.R. § 147.131(a) and § 147.131(c). However, § 147.131(a) ultimately limits the exemption to nonprofit churches and church-related entities, while offering only a flimsy "accommodation" to other faith nonprofits. *See* Brief for Petitioners at 7, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

Smith, 494 U.S. 886 n.3 (emphasis added). Thus, regulations or classifications within those regulations that are "based on religion" cannot be religion-neutral.

By contrast, where there is a law that is entirely religion-neutral, and it *only* has the mere *effect* of interfering with free exercise of religion as an incidental and unintended consequence, then, this Court noted, it need not be justified by a compelling governmental interest. *Id.* (i.e. "generally applicable laws *unconcerned with regulating* speech [or religious exercise] . . . .") (emphasis added).

Here, however, it can hardly be said that the HHS guidelines were "unconcerned with regulating" religious entities in light of the fact that they purported to create a "religious" exemption scheme, they specified in detail that some religious groups could qualify for exemptions, some could not, and then expressly determined that for-profit employers, despite their religious mission, the faith of their owners, or the religious nature of their activities, would be categorically ineligible for the "religious" exemption. It seems clear that the flawed HHS religious exemption approach was the quintessential "governmental classifications *based on religion*," *Id.* (emphasis added), anticipated in *Smith* as requiring proof of a compelling governmental interest in order to satisfy the demands of free exercise of religion.

More to the point, as this Court noted in *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) where the government "'has in place a system of . . . exemptions,'" it cannot thereafter "'refuse to extend that system to cases of religious hardship without

compelling reason.'" *Id.* (quoting *Smith*, 494 U.S. at 884; and citing in accord, *Thomas v. Review Bd. of Indiana Emp't Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987). Considering the factual "hardship" in the form of huge fines that will be imposed on the religious companies here, this is strong evidence that the religious exemption provisions of the HHS guidelines, to be sustained at all, must be justified by a "compelling reason."

C. The Burden on Free Exercise Rights

1. The De Minimis Protection of Grandfather Provisions

The HHS guidelines permit some existing health insurance plans to be "grandfathered" out of the preventive services coverage requirement. Gov't Pet. at 30 (citing 45 C.F.R. § 147.140). The government admits, however, that this "does not effect a permanent exemption; instead, it is transitional in effect," during only the period of time that the ACA "is implemented." *Id.*

Moreover, 45 C.F.R. § 147.140(g) indicates that "cessation of grandfather status" can be caused with ease, triggered by any one of a long litany of changes to existing health insurance plans, including substantial changes to benefits for diagnosis or treatment of a condition, any increase in an individual's co-insurance requirement, increase in deductible or out-of-pocket limits, certain increases in a fixed-amount copayment, adoption of certain annual dollar value limits, or decreases in the dollar value of some annual limits. 45 C.F.R. §§ 147.140

(g)(i)–(v). Given the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the "grandfather" exclusion is *de minimis* and transitory at best, something the government appears to concede.[12]

2. The Religious Burden

When government regulations "require [citizens] to choose between their religious beliefs and receiving a government benefit" (or even worse, to incur "civil sanctions"), such regulations are not facially neutral with respect to religion, and a free exercise analysis is required to determine whether those regulations have imposed a substantial burden on the religious rights of the complainant. *Locke v. Davey*, 540 U.S. 712, 720 (2004) (footnote omitted). Here, the two closely-held religious companies will face such staggering fines and civil sanctions that they could be forced to close their doors. Short of imprisonment, one can hardly conceive of a greater interference with those who founded, invested their lives in, and control those enterprises.

The rights of religious conscience were recognized as preeminent rights in the First Amendment by the Founders. During the Bill of Rights debates in the First Congress, the *Gazette of the United States* records that James Madison called

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[12] Not surprisingly, Hobby Lobby received no benefit from these grandfather provisions. As they indicate: "[t]he plan [of Hobby Lobby] lost grandfather status due to changes made before the contraceptive-coverage requirement was proposed." Brief for Respondents on Petition for Writ of Certiorari at 8 n.7, *Sebelius v. Hobby Lobby Stores, Inc.,* No. 13-354.

"the rights of conscience [among] those choicest flowers in the prerogative of the American people . . . ."[13]

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a violation of religious conscience and belief was determined to be "substantial" where state regulations commanded the Amish complainants "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. Their choice was to comply, "or be forced to migrate to some other and more tolerant region;" that latter option struck at the heart of what the Free Exercise Clause was meant to prevent. *Id.*, *see also* n.9. Because the HHS regulations, and indeed the ACA as well, are federal laws that sweep the nation, the owners of the faith-based companies here do not have the choice to move to a more "tolerant" state, a bitter and unconstitutionally compelled choice perhaps, but one that at least the Amish had in *Yoder*.

In *Yoder* it was also noted that "the State [did not] undertake to meet the claim that the Amish mode of life [at issue] . . . is inseparable from and a part of the basic tenets of their religion . . . ." *Id.* at 219. The same can be said here. The government has

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[13] *Creating the Bill of Rights – The Documentary Record from the First Federal Congress* 66-67 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford, eds., The John Hopkins University Press 1992). Rights of "conscience" was the term of art used for free exercise of religion during the Bill of Rights debates in the First Federal Congress. James Madison summed up the essence of the Free Exercise Clause as protecting persons from being "compelled" to disobey God and to obey "laws of such a nature as might infringe the rights of conscience . . . ." *Id.* at 157-58.

not refuted the fact that the owners of both companies held a faith-based objection of such a nature that it commanded them to refuse to comply with the specific preventive services portion of the HHS regulations. In fact, the government concedes it in its merits brief. Brief for Petitioners at 8, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 ("Pet. Br. in Hobby Lobby") ("The Greens maintain the sincere religious conviction 'that human life begins at conception' . . . .") (citation omitted).

The government argues that the free exercise claims of the faith-based owners and their companies are "too attenuated" to succeed, because "independent third parties" (i.e. the employees and their doctors) will make the decision whether to use medications that will prevent a pregnancy from continuing, and therefore such decisions are in no "meaningful sense" the employer's decision. *Id.* at 32-33, citing *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting).[14]

However, the government's argument ignores the fact that individual decisions by employees to use pregnancy altering drugs under the employer's insurance coverage *are made possible because of employment at the employer's company*, regardless of who pays for that part of the coverage. A similar approach was argued by Justice Douglas in his dissent in *Yoder*, where it was asserted that vindication of the free exercise rights of the Amish parents could violate the independent rights of their

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[14] The government also cites *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-55 (2002) for this point. Pet. Br. in Hobby Lobby at 33. But that case involved the endorsement test of the Establishment Clause.

children, who were entitled to a voice in the decision about their own education: "If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children." *Yoder*, *supra* at 242, Douglas, J., dissenting. Yet, that position was rejected by this Court. *Id.* at 230-31 ("It is the parents who are subject to prosecution . . . and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent").

Last, the government argues that a substantial burden on religion is avoided due to medical confidentiality, because the religious employers would never know whether employees were actually using coverage supplied through their place of business. Pet. Br. in Hobby Lobby at 34 (citation omitted). This approach is an odd and highly suspect approach to religious freedom: in effect telling religious employers – "if you don't like the thought of being complicit in a forbidden act, but you don't want to close your doors, then simply close your eyes." Just as this Court refused to tell the Amish in *Yoder* that they could avoid a burden on their religion by moving to a more "tolerant" state, so this Court should also refuse to tell faith-based, closely-held companies and their owners that they will be forced to "close their eyes" to the religious implications of providing that part of the insurance coverage that is at issue here.

D. The Mirage of Harmful Religious Claims

The government has raised the specter, if their position is rejected by this Court, of "ad hoc opt-outs by employers outside of clearly drawn categories . . . . [C]ontrolling shareholders might have religious objections to other preventive services (such as immunizations) . . . ." Gov't Pet. at 29. In the government's merits brief it has constructed a miniature *parade of horribles*: religious employers "might," they argue, "assert religious objections to coverage of . . . immunizations, blood transfusions, anti-depressants, medications derived from pigs, and gene therapy." Pet. Br. in Hobby Lobby at 45.

But such threats are illusory. Context is critical. The religious objections of Hobby Lobby and Conestoga must be viewed in the historical and legal context of religious-based objections to medical practices that are designed and intended to end pregnancies after conception and before birth. We have previously indicated the obvious legal and historical context that makes this case and this issue unique from other religious-based objections that might be raised over the propriety of other medical services provided through ACA health insurance coverage. *See* section II. A, *supra*.

The free exercise rights of Hobby Lobby and Conestoga should be recognized on the basis of this record, and upon the fact that the jurisprudence of this Court has recognized for many decades that some Americans have religious objections to those medical services—or similar to those—which are at issue here. This Court should reject any invitation to engage in speculation about possible objections of

hypothetical future employers regarding other unrelated health services, because those cases, whatever they might be in the future, could not possibly share any of the long, well-documented history or context that belongs to the precise religious liberty burden that is complained of here.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the 10th Circuit Court of Appeals in the *Hobby Lobby* case, and should reverse the judgment of the 3rd Circuit Court of Appeals in the *Conestoga* case.

Respectfully submitted,

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