Nos. 13-354 & 13-356

In The Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

BRIEF OF TEXAS BLACK AMERICANS FOR LIFE AND THE LIFE EDUCATION AND RESOURCE NETWORK (LEARN) AS AMICI CURIAE IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF THE *AMICI*

This Court's *amici*, Texas Black Americans for Life and the Life Education And Resource Network (LEARN), are organizations which seek to educate the public to the fact that both abortion and contraception have been used, and continue to be used, as a tool by some who wish to target the African-American community.[1] See http://www.learninc.org/. Throughout this brief your *amici* shall refer to HHS Secretary Sebelius as "Petitioner" and to the business owners and their companies as "Respondent".

SUMMARY OF ARGUMENT

I. This Court recognized in *New York Times v. Sullivan*[2] that the burden which could be imposed by the civil Law of Libel on the New York Times and certain leaders of our Civil Rights Movement (such as Dr. King and his closest assistant, the Rev. Ralph Abernathy) could effectively prohibit Freedom of the Press just as effectively as a criminal prohibition against publishing would, and in fact, even more so. On that basis this Court held that the state law of libel cannot operate in unfettered fashion if it effectively nullifies the First Amendment's Freedom of the Press.

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[1] Counsel of record on this brief is the sole author of this brief, and no person or entity other than your *amici* and counsel of record for the *amici* made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the consent of all parties.

[2] 376 U.S. 254 (1964).

We submit that the imposition of the HHS Mandate,[3] as applied, constitutes every bit as much of a civil burden on the exercise of the Free Exercise of Religion as the state Law of Libel imposed on Freedom of the Press in *Sullivan*, and that accordingly, this Court should apply constitutional principles just as diligently and as thoroughly here as it did in *Sullivan*. This protection is needed especially today.

II. This Court must recognize that it is now faced with the very type of constitutional crisis which Justice O'Connor warned us about in her opinion in *Webster v. Reproductive Health Services*.[4] Justice O'Connor warned us that if the law leaves only one avenue open for one to exercise a constitutional right, and then makes the use of that one way unlawful, such a scheme would be unconstitutional. Because of the way state law operates, there is no practical means whereby the Respondent business owners could engage in their chosen means of earning an income without resort to the corporate form of identity as established by state law. But now Petitioner Sebelius says that in order to conduct their businesses, they must give up their Free Exercise rights. The Respondent business owners, boxed in as they are, are therefore in the very type of predicament which Justice O'Connor recognized could indeed happen.

[3] 45 C.F.R. § 147.30.

[4] 492 U.S. 490, 522 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

ARGUMENT

I. This Case In Free Exercise Law Requires The Same Analysis And Holding As This Court Reached In Freedom Of The Press Law In *New York Times v. Sullivan*

In *New York Times v. Sullivan* this Court was faced with a novel question of law.[5] *Sullivan* was, of course, a case from 1964 in which the New York Times was faced with an onerous civil judgment stemming from the decision by the New York Times to run an advertisement paid for by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[6] Also subject to the judgment was the Rev. Ralph Abernathy, Dr. King's closest confidante, and other clergy leaders of our Civil Rights Movement.[7]

In considering the plight of the New York Times, Dr. King, Rev. Abernathy, and our other Civil Rights leaders, this Court said,

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. [footnote omitted][8]

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[5] *New York Times v. Sullivan*, 376 U.S. 254, 256 (1964).

[6] *Sullivan*, 376 U.S. at 256-257.

[7] *Ibid.*

[8] *Sullivan*, 376 U.S. at 277.

This Court then went on to explain the constitutional infirmities of any legal framework which, as a practical matter, would render the First Amendment right of Freedom of the Press meaningless. This Court first took note of the fact that in the civil action which was being reviewed in that case, there was no protection of the type which would normally apply in a criminal case, such as the need for an indictment and proof beyond a reasonable doubt.[9] This Court next noted that the civil penalty which the New York Times faced was one thousand times greater than the penalty under the criminal libel statute of the State of Alabama.[10] This Court then noted that under civil law, the New York Times could be subject to judgments from multiple plaintiffs for one single publication, something which stands in sharp contrast to the protection against double jeopardy found in criminal cases.[11] Finally, in summation, this Court said that the law of civil libel to which the New York Times was subject in that case was,

> a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law[12] (citation omitted) (quotation marks omitted).

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[9] *Ibid.*

[10] *Ibid*.

[11] *Sullivan*, 376 U.S. at 278.

[12] *Ibid.*

This Court's reasoning was simply this: under the First Amendment, the State of Alabama certainly could not make it a criminal offense for the New York Times to publish. And thus, under the First Amendment, the State of Alabama likewise could not, by civil actions, impose even greater burdens on publishing than would be attendant with criminal liability.

In the same manner, in the case at bar, no one could seriously suggest that the federal government could criminalize the Free Exercise of Religion. And, as was the case in *Sullivan*, so also it is true in the case at bar that neither the Respondent corporations nor the Respondent business owners enjoy the protection of the need for an indictment and proof beyond a reasonable doubt. Likewise, the civil penalties which the Respondent corporations could face directly, and which the Respondent business owners would face with equal force indirectly, could be greater than an ordinary criminal fine. And the Respondent corporations, which have multiple employees, would have no protection against double jeopardy, and could thus be subject to multiple judgments by disgruntled employees, each of which might exceed that of an ordinary criminal fine, all because the Respondent business owners, who would feel the real brunt of all this, refuse to violate their consciences. The result of this is that the HHS Mandate[13] constitutes (to borrow the words of this Court) "a form of regulation that creates

[13] 45 C.F.R. § 147.130.

hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."[14]

Furthermore, in *Sullivan* there was no state action. In the case at bar, by contrast, the action complained of is that of the Petitioner while acting in her official capacity as an officer of the federal government.

In light of all this, this Court should rule in the same manner as it did in *Sullivan*, by holding that the First Amendment liberty of the Free Exercise of Religion is just as susceptible to being extinguished by civil penalties as the First Amendment right of Freedom of the Press is; therefore, the First Amendment liberty of the Free Exercise of Religion is just as much in need today of the strong protection which this Court applied in *Sullivan* as Freedom of the Press needed back then, and still needs today.

Now, we wish to be perfectly clear about this: in making our argument, we are not saying that *Sullivan* is specifically governing precedent here. All we are saying, rather, is that if this Court is to continue to uphold *Sullivan*, it would make no sense not to extend to the Respondents in the case at bar the same type of protection which this Court extended in *Sullivan*. We ask this Honorable Court to bear in mind that in *Sullivan* there was no prior case which

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[14] *Sullivan*, 376 U.S. at 278.

reached the same specific holding which this Court did reach in *Sullivan*; rather, this Court reached the holding which it reached in *Sullivan* simply on the logic and principles of the matter. As we mark the 50th anniversary of this Court's holding in *Sullivan* (March 9, 2014), we ask this Court to do the same here.

There is one more point which we feel we must address. In many ways, it may be the most important point of all. Right now the whole world groans beneath the burden of having to watch while a new wave of oppression and intolerance spreads across the face of the earth. What we had once thought to be a relic of the past not only retains its foothold on humanity, but in fact seems to wax stronger and stronger with each passing day. Christians are imprisoned and executed for their faith, and persons of all persuasions are tortured in North Korea for believing almost anything at all with which the "Dear Leader" disagrees.

If there is one thing above all others which has made America different from the past, it is this: America has produced the most vibrant defense and unabashed promotion of liberty the world has ever known, a spirit truly symbolized by the torch which the proud Lady in New York harbor so boldly holds on high for all the world to see. We pray this Honorable Court, do not let that torch fall from her hand. Especially not now.

II. The Imposition Of The HHS Mandate In The Case At Bar Creates The Type Of Impermissible Barrier To The Exercise Of Constitutional Rights Which Justice O'Connor Warned Us About

The Petitioner's use of state law as an anvil against which she can crush the Respondent business owners with the federal civil hammer presents the type of scenario which Justice O'Connor warned us about in her opinion in *Webster v. Reproductive Health Services* in 1989. In *Webster*, Justice O'Connor first addressed the appellee abortionists' facial challenge to a statute regulating abortion, a challenge which she rejected.[15] Nevertheless, she did warn us that if the law were ever to leave somebody with only one means of exercising a constitutional right, and then prohibited the use of that one means, such a scheme would be unconstitutional.[16] In light of that, we ask this Honorable Court to consider the following analysis for the case at bar:

1.) Due to the way that state law operates, as a practical matter, it is impossible for the Respondent business owners to earn a living through their chosen

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[15] *Webster*, 492 U.S. at 522-524 (O'Connor, J., concurring in part and concurring in the judgment). (Note: the appellee abortionists, in contrast to the Respondents in the case at bar, wanted a form of government financial assistance.)

[16] *Webster*, 492 U.S. at 523-524 (O'Connor, J., concurring in part and concurring in the judgment).

profession other than by using the corporate form of business identity as defined by state law.

2.) The Petitioner's argument essentially boils down to this: due to the operation of the state Law of Corporations, together with the HHS Mandate, the Respondent business owners cannot exercise their right to the Free Exercise of Religion under the First Amendment without giving up their chosen means of earning an income; or, to put it conversely, due to the way state law and the HHS Mandate operate together, the Respondent owners cannot continue in their chosen means of earning an income without surrendering to the Petitioner their First Amendment right to the Free Exercise of Religion and without leaving their religious convictions entirely behind.

3.) Thus, if the Petitioner is correct, the use of the state Law of Corporations, along with the HHS Mandate, to advance the personal political goals of the Petitioner (goals which Congress never endorsed) effectively squeezes the Respondent business owners between federal civil law and state law in the very way which Justice O'Connor once warned us about. For if this Court upholds this application of the HHS Mandate, if the Respondent business owners do wish to continue to exercise their constitutional rights, it will then be illegal for them to use the one avenue which the state Law of Corporations leaves open to them to conduct business if their businesses are in fact to remain profitable and survive.

With that in mind, let us consider whether the Respondent business owners' decisions to incorporate, and remain with the corporate form of business identity, was purely voluntary. We submit that it was not purely voluntary because, in light of practical considerations (*e.g.*, pertaining to tax advantages), there is no way that the Respondent owners could conduct their enterprises at the level at which they do now – while remaining competitive with other, similar businesses – without adopting the only form of corporate identity available to them under state law, a form of business identity which, the Petitioner claims, affords them no right to religious liberty.

Yet even if this Honorable Court does find that the Respondent business owners' decisions to incorporate was purely voluntary, and even if this Honorable Court might therefore be disposed to find that they could gain Free Exercise protection by voluntarily choosing to disincorporate and then defend their Free Exercise rights as natural persons, we wish to remind this Honorable Court of this statement from its own jurisprudence,

> A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.[17]

Accordingly, it would be no answer to say that the Respondent business owners are responsible for

[17] *United States v. Jackson*, 390 U.S. 570, 583 (1968).

their own predicament on the grounds that they voluntarily chose the corporate form of business identity, and because they now voluntarily choose to stay with that identity. For this still would not somehow relieve the Petitioner of all responsibility for her actions which impair their Free Exercise rights, even if this Court were to find that there is no coercive element here at all. This Honorable Court should thus find that the imposition of the HHS Mandate in these circumstances is prohibited by the Free Exercise Clause.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit in *Sebelius, et al. v. Hobby Lobby, et al.* should be affirmed, and the judgment of the United States Court of Appeals for the Third Circuit in *Conestoga Wood Specialties, et al. v. Sebelius, et al.* should be reversed.

Respectfully submitted,

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