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 Tenth and Third Circuits

BRIEF OF AMERICAN FREEDOM LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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QUESTIONS PRESENTED

The question presented in *Sebelius v. Hobby Lobby Stores, Inc.*, was framed by the government as follows:

> The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. [§§] 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless the burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. [§§] 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

In *Conestoga Wood Specialties Corp. v. Sebelius*, the petitioners framed the question presented as follows:

> Whether the religious owners of a family business, or their closely-held business corporation, have free exercise rights that are violated by the application of the contraceptive coverage Mandate of the Patient Protection and Affordable Care Act of 2010 ("ACA").

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae* American Freedom Law Center (hereinafter referred to as "AFLC") respectfully submits this brief in support of the respondents in *Hobby Lobby Stores, Inc.* and the petitioners in *Conestoga Wood Specialties Corp.*, urging the Court to protect the fundamental right to religious exercise that is violated by the contraceptive services mandate of the Patient Protection and Affordable Care Act of 2010 (hereinafter "Affordable Care Act" or "Act").[1]

AFLC is a national, public interest law firm that advances and defends America's Judeo-Christian heritage and moral values, including religious freedom and the sanctity of human life. AFLC accomplishes its mission through litigation, education, and public policy initiatives.

To further its public interest mission of safeguarding religious freedom, AFLC is lead counsel for two legal challenges to the contraceptive services mandate. The first legal challenge was filed on behalf of Johnson Welded Products, Inc., an Ohio-based company, and its owner, Ms. Lilli Johnson, a devout

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

AFLC further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than AFLC, its members, or its counsel made a monetary contribution to its preparation or submission.

Catholic who wants to operate her family business according to the precepts of her faith. This case, in which the government consented to a preliminary injunction, is currently pending in the U.S. District Court for the District of Columbia. *See Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609-ESH, Minute Order, (D.D.C. May 24, 2013) (granting unopposed motion for preliminary injunction).

The second legal challenge was filed on behalf of Priests for Life, a nonprofit Catholic organization; Father Frank Pavone, the National Director of Priests for Life; Dr. Alveda King, the niece of civil rights leader Martin Luther King, Jr. and the Pastoral Associate and Director of African-American Outreach for Priests for Life; and Janet Morana, the Executive Director of Priests for Life. This case is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit. On December 31, 2013, the court of appeals granted Priests for Life's emergency motion for an injunction, enjoining the enforcement of the contraceptive services mandate pending appeal. *See Priests for Life v. U.S. Dep't of Health & Human Servs.,* 2013 U.S. Dist. LEXIS 177951 (D.D.C. Dec. 19, 2013), *injunction granted*, No. 13-5368, Order at 2, (D.C. Cir. Dec. 31, 2013), *petition for cert. filed*, (Jan. 23, 2014).

In both cases and similar to the situation confronted by the challengers here, private citizens seek to operate their company or organization in accord with the tenets of their faith. Permitting the government to impose this unconscionable mandate on businesses and nonprofit organizations will effectively exclude faith-conscious owners and directors from participating in

business affairs and public life — a result squarely at odds with the First Amendment and RFRA.

INTRODUCTION

> Sir Thomas More: "And when we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me, for fellowship?"

Robert Bolt, *A Man for All Seasons* 132 (1960)

For people of faith, matters of morality and conscience are not *insubstantial* — they are serious concerns that directly and materially affect a person's soul and thus eternal salvation, which is far more important than a person's physical health and thus exponentially more important than increasing the use of contraceptive services — services the government promotes under the guise of healthcare. And one's religious beliefs are not simply personal beliefs that are checked in and out at the cathedral door. Rather, for the faithful, their religious beliefs transcend all that they do. Indeed, for Catholics such as Ms. Johnson and Father Pavone, their faith is their guide for how they conduct their lives, both private and public. *See, e.g., Gilardi v. U.S. Dep't of Health & Human Servs.,* 733 F.3d 1208, 1217 (D.C. Cir. 2013) ("Equally uncontroverted is the nature of the Gilardis' religious exercise: they operate their corporate enterprises in accordance with the tenets of their Catholic faith."). And their religious beliefs and practices are beyond the reach of government compulsion and thus beyond the government's purview of what is or is not a burden upon those beliefs and practices. Otherwise, the First

Amendment loses its meaning and force as a *restriction* on the power of government. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is . . . well understood.").

Through its defense of the challenged mandate, the government urges this Court to accept what it, the government, believes is an acceptable burden upon religious beliefs and practices. Indeed, the government urges the Court to accept the position that "a proffered burden" upon one's religious beliefs is "not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justification for, governmental programs that may offend his beliefs." Pet'r Sebelius Br. in *Hobby Lobby* at 33. But by whose measure, then, are we to determine what is an "objective outer limit": the measure of the government agency that is empowered to enforce the program or the man whose conscience is burdened in the process? The answer to that fundamental question rests, as it should, with the latter. *See Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs."). Indeed, moral teachings that guide the consciences of the faithful do not change with — nor can they be changed by — "legal regimes" or "societal expectations," and that is certainly the case with the Church's universal and consistent moral teaching on contraception — a teaching that has been in place for over 2,000 years.

And despite the best efforts of man and the federal government, this teaching will not, because it cannot, change. As Pope Paul VI made clear in *Humanae Vitae*, which confirmed the Church's universal teaching regarding the immorality of contraceptive practices:

> It is to be anticipated that perhaps not everyone will easily accept this particular teaching. There is too much clamorous outcry against the voice of the Church, and this is intensified by modern means of communication. But it comes as no surprise to the Church that she, no less than her divine Founder, is destined to be a "sign of contradiction." She does not, because of this, evade the duty imposed on her of proclaiming humbly but firmly the entire moral law, both natural and evangelical.
>
> Since the Church did not make either of these laws, she cannot be their arbiter — only their guardian and interpreter. *It could never be right for her to declare lawful what is in fact unlawful, since that, by its very nature, is always opposed to the true good of man*.
>
> In preserving intact the whole moral law of marriage, the Church is convinced that she is contributing to the creation of a truly human civilization. She urges man not to betray his personal responsibilities by putting all his faith in technical expedients. In this way she defends the dignity of husband and wife. This course of action shows that the Church, loyal to the example and teaching of the divine Savior, is sincere and unselfish in her regard for men whom she strives to help even now during this

> earthly pilgrimage "to share God's life as sons of the living God, the Father of all men."

Humanae Vitae ¶18 (1968) (emphasis added). Similarly, it could never be right for civil authorities — whether the federal government or this Court — to declare moral what is in fact immoral for a person of faith, "since that, by its very nature, is always opposed to the true good of man."

In the final analysis, religious beliefs and rights of conscience that flow from those beliefs are not subject to popular vote, majoritarian preferences, "societal expectations," "legal regimes," the predilections of the Executive Branch, or the predilections of this Court. The Bill of Rights ensures us of that outcome. Consequently, it should ensure us that this Court will uphold this fundamental freedom against the government's unconscionable and unlawful mandate — an outcome similarly compelled by RFRA.

SUMMARY OF THE ARGUMENT

The ultimate question for this Court is not whether compliance with the contraceptive services mandate can be reconciled with the religious beliefs of the challengers. That's a question of religious conscience that no civil authority, including this Court, can decide. Indeed, it cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs. Here, the challengers have concluded that their legal obligations under the mandate and their religious obligations compelled by their consciences are incompatible. Thus, by presenting challengers with a Hobson's choice of either violating their religious beliefs or suffering crippling financial

penalties, the mandate imposes a substantial burden on religious exercise, properly understood, in direct violation of RFRA.

ARGUMENT

I. The Church's Universal and Consistent Moral Teaching on the Immorality of Contraceptive Services Is Binding on the Consciences of the Faithful.

The Church "teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life." *Humanae Vitae* ¶11. "This particular doctrine, often expounded by the magisterium of the Church, is based on the inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance which are both inherent to the marriage act." *Humanae Vitae* ¶12. Thus, "an act of mutual love which impairs the capacity to transmit life which God the Creator, through specific laws, has built into it, frustrates His design which constitutes the norm of marriage, and contradicts the will of the Author of life. Hence to use this divine gift while depriving it, even if only partially, of its meaning and purpose, is equally repugnant to the nature of man and of woman, and is consequently in opposition to the plan of God and His holy will." *Humanae Vitae* ¶13. Therefore, based "on the first principles of a human and Christian doctrine of marriage," the Church is "obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children.

Equally to be condemned, as the magisterium of the Church has affirmed on many occasions, is direct sterilization, whether of the man or of the woman, whether permanent or temporary. Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation — whether as an end or as a means." *Humanae Vitae* ¶ 14.

As Pope Paul VI prophetically observed in *Humanae Vitae:*

> Responsible men can become more deeply convinced of the truth of the doctrine laid down by the Church on this issue if they reflect on the consequences of methods and plans for artificial birth control. Let them first consider how easily this course of action could open wide the way for marital infidelity and a general lowering of moral standards. Not much experience is needed to be fully aware of human weakness and to understand that human beings — and especially the young, who are so exposed to temptation — need incentives to keep the moral law, *and it is an evil thing to make it easy for them to break that law*. Another effect that gives cause for alarm is that a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires, no longer considering her as his partner

> whom he should surround with care and affection.

Humanae Vitae ¶ 17 (emphasis added).

Thus, it has come to pass that the widespread use of contraceptives has indeed harmed women physically, emotionally, morally, and spiritually — and has, in many respects, reduced her to the "mere instrument for the satisfaction of [man's] own desires." Consequently, the promotion of contraceptive services — the very goal of the challenged mandate — harms not only women, but it harms society in general by "open[ing] wide the way for marital infidelity and a general lowering of moral standards." Responsible men and women cannot deny this truth.

In sum, for adherents to Church teaching, contraceptive services are not properly understood to constitute medicine, healthcare, or a means of providing for the well-being of persons. Rather, these procedures involve gravely immoral practices, and compelling people of faith to promote or facilitate their use imposes a substantial burden on the exercise of religion, properly understood.

II. The Government's "Substantial Burden" Argument Invites the Court to Determine the Validity of the Challengers' Religious Objection to the Mandate.

It is well established that "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. And while the government gives a nod to this longstanding principle of free exercise jurisprudence, *see* Pet'r Sebelius Br. in *Hobby Lobby* at 32, it nonetheless invites this Court to assume that role. The

Court should reject this invitation, which will essentially subject religious beliefs (and religious objections to government programs based on those beliefs) to those to which the government deems valid. *See Hernandez v. Comm'r of Internal Revenue Serv.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular litigant's interpretation of those creeds."); *United States v. Seeger*, 380 U.S. 163, 185 (1965) (acknowledging that the court's limited competence in this area extends to determining "whether the beliefs professed by [the challengers] are sincerely held and whether they are, in [their] own scheme of things, religious"); *see also Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985) (noting that courts must be vigilant to "avoid any test that might turn on the factfinder's own idea of what a religion should resemble") (internal quotations and citation omitted); *Sample v. Lappin*, 424 F. Supp. 2d 187 (D.D.C. 2006) ("The Court's inquiry is limited to 'whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.'") (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (upholding the granting of a preliminary injunction under RFRA in a case in which the plaintiff refused to submit to a PPD test, claiming that accepting artificial substances into the body is a sin under the tenets of Rastafarianism)).

III. *Thomas* Compels a Finding that the Contraceptive Services Mandate Imposes a Substantial Burden on Religious Exercise in Violation of RFRA.

In defense of its claim that the challenged mandate and the onerous penalties associated with failing to comply with it do not substantially burden religious exercise, the government attempts to distinguish *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). *See* Pet'r Sebelius Br. in *Hobby Lobby* at 35-37 (characterizing the argument as follows: "Respondents rely on *Thomas* for the proposition that the Court must accept not only their definition of their sincerely held religious belief but also their position that their religious exercise would be substantially burdened by the provision they challenge"). However, that attempt is unavailing.

In *Thomas*, this Court held that the State's denial of unemployment compensation benefits because the employee *voluntarily* terminated his employment with a factory that produced armaments, claiming that the production of items that could be used for war was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. *See Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). Indeed, Thomas specifically stated that he did not object to the physical work required of him. *Id.* at 711 ("When asked at the hearing to explain what kind of work his religious convictions would permit, Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in

good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms — for example, as an employee of a raw material supplier or of a roll foundry.").

In fact, Thomas made it clear that it was not the physical act of the work that violated his religious beliefs, but the purposes and effects of what someone else would do with the result of his "work" at some later point in time (*i.e.*, use the tanks he worked on for war). *See id*. at 714 (quoting Thomas at his hearing). So it is that Thomas did object to doing the exact same unobjectionable work when that work resulted in a thing (*i.e.*, a tank) that would be used subsequently by a third-party (*i.e.,* the military) to do that which was objectionable: to wage war. That is, not only is waging war objectionable to Thomas, but any act, the purpose and effect of which is to facilitate the waging of war by a third party at some later time, was proscribed by Thomas' religious beliefs and thus a substantial burden was found. Consequently, *Thomas* provides an *a fortiori* argument for a RFRA violation here. Thomas stated expressly that he had no religious objection to working in a roll foundry, the product of which might be used later to build a tank. But doing that same work in a factory that more directly violated his religious objection to war was too direct pursuant to his religious beliefs. In other words, this Court credited Thomas' religious beliefs for determining how direct or indirect an enabler or facilitator Thomas could be before he violated his religious beliefs (and thus a substantial burden found). Neither a federal court nor a government agency may decide how direct an enabler or facilitator Thomas could be for war waging. *Id.* at 715 ("Thomas drew a line, and it is not for us to say

that the line he drew was an unreasonable one."). And the same is true here with regard to the contraceptive services mandate. Indeed, the burden here is more substantial in that the Hobson's choice presented by the challenged mandate is not simply between violating one's religious beliefs or forfeiting benefits, as in *Thomas*. Rather, the challengers must choose between violating their religious beliefs or being subject to substantial penalties that will financially ruin them and their family-run business that they spent a lifetime building.

The Seventh Circuit in *Korte v. Sebelius,* 735 F.3d 654 (7th Cir. 2013), reaffirmed this principle in a case challenging the contraceptive services mandate by expressly rejecting the argument the government presents here:

> The government's "attenuation" argument posits that the mandate is too loosely connected to the use of contraception to be a substantial burden on religious exercise. Because several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception, any complicity problem is insignificant or nonexistent. This argument purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question.
>
> To repeat, the judicial duty to decide substantial-burden questions under RFRA does

> not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken. . . . The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for the Kortes and the Grotes to decide. They have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

Id. at 685.

The D.C. Circuit similarly rejected the government's argument in *Gilardi v. U.S. Dep't of Health & Human Servs.,* 733 F.3d 1208 (D.C. Cir. 2013), stating, in relevant part:

> The contraceptive mandate demands that owners like the [challengers] meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement — procured exclusively by regulatory ukase — is a "compel[led] affirmation of a repugnant belief." *See id*. That, standing alone, is a cognizable burden on free exercise. And the burden becomes substantial because the government commands compliance by giving the [challengers] a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a

> penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," we fail to see how the standard could be met. *See Thomas*, 450 U.S. at 718.

Gilardi, 733 F.3d at 1218

In the final analysis, the ultimate question for this Court is not whether compliance with the challenged mandate can be reconciled with the religious beliefs of the challengers. That's a question of religious conscience that no civil authority can decide. The challengers have concluded that their legal obligations under the mandate and their religious obligations are incompatible. Thus, by presenting challengers with a Hobson's choice, the mandate imposes a substantial burden on religious exercise, properly understood, in direct violation of RFRA.

CONCLUSION

The Court should hold that the contraceptive services mandate of the Affordable Care Act substantially burdens the challengers' exercise of religion in violation of RFRA.

Respectfully submitted,

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