Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, and 15-191

IN THE SUPREME COURT OF THE UNITED STATES

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, et al.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

On Writs of Certiorari to the U.S. Court Of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits

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BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Amicus Liberty Counsel filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on behalf of Liberty University and various individuals. Amicus has developed a significant body of information on the detrimental effects that various provisions in the Act, including the regulations at issue in this case, have on foundational rights, particularly on free exercise rights of faith-based non-profit employers, of which amicus is one.

Amicus has a unique perspective on the question of whether the Preventive Care Mandate violates free exercise under the Religious Freedom Restoration Act ("RFRA"). Amicus believes that the information it provides in this brief is of critical importance to this Court's resolution of the conflict between

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have filed blanket consents to the filing of Amicus Briefs on behalf of either party or no party.

religious freedom and government regulation, and will aid the Court in reaching a reasoned decision.

Based upon the foregoing, Amicus respectfully submits this Brief for the Court's consideration.

INTRODUCTION

This case presents a conflict as old as the Republic, *i.e.,* a clash between the inalienable right to free exercise of religion and government regulation of activities integral to religious exercise. Ignoring the free exercise rights protected by the First Amendment to the United States Constitution and the re-affirmation of those rights in RFRA, Respondents have enacted regulations that compel faith-based non-profit employers to choose between their sincerely held religious beliefs and continued viability of their organizations which serve the poor and elderly and provide education. Respondents placed the Act on a collision course with foundational free exercise rights when they defined "women's preventive care" in employer-provided health insurance to include all FDA approved "contraceptives"–including abortion inducing drugs and devices–and requiring that they be provided at no cost to employees and

dependents.[2] Respondents have refused to exempt from the Preventive Care Mandate faith-based non-profit organizations, such as Petitioners, which are prohibited by their sincerely held religious beliefs from providing or facilitating the purchase of certain contraceptives. Instead, Respondents have devised a series of purported "accommodations" that would shift payment for the contraceptives from Petitioners to third parties, but would still put Petitioners in the position of facilitating the purchase of prohibited contraceptives.

Respondents insist that the accommodations are not a substantial burden on Petitioners' free exercise of religion because Petitioners are no longer required to directly fund the purchases. Petitioners have asserted that the accommodations are a substantial burden on their free exercise rights because they still require that Petitioners facilitate the purchase of products that violate their religious beliefs. Nevertheless, Respondents insist that there is no substantial burden. In so doing, Respondents are asserting that they, not the religious adherents, are the arbiters of what is

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[2] Amicus will refer to the regulations incorporating coverage for contraceptives and abortifacients into the definition of women's preventive care under the Act as the "Preventive Care Mandate."

a substantial burden, and concomitantly, what is a valid religious belief.

Respondents' assertion of authority over the question of what is a substantial burden contradicts founding principles, the First Amendment, RFRA and this Court's precedents. This Court should reject Respondents' contentions and uphold the longstanding right of religious adherents to define the nature and extent of their religious beliefs, including whether a government regulation substantially burdens them.

LEGAL ARGUMENT

Since the dawn of this Republic founded upon religious freedom, the question of whether a particular government enactment substantially burdens religious exercise has been the purview of the religious individuals or organizations affected by the enactment. Contravening these foundational precepts, Respondents purport to define on their own what is and is not a "substantial burden" for the faith-based non-profit organizations seeking relief from this Court. Posing as arbiters of what is a sincerely held religious belief, Respondents claim that Petitioners' religious free exercise rights are not substantially burdened by the Preventive Care Mandate in light of "accommodations" purporting to shift payment responsibility.

This attempt to second-guess Petitioners' religious beliefs in order to impose a newly minted right to free contraception is just the kind of tyrannical encroachment that the Founders sought to prevent by placing protection of the free exercise of religion in the First Amendment.[3] It is also the kind of governmental overreach that Congress sought to forestall by enacting RFRA with a near unanimous vote in both houses.[4] This Court, likewise, has consistently warned against courts or governmental agencies presuming to categorize a particular belief or assess its plausibility. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990).

In keeping with the founding principles reflected in the First Amendment, RFRA and precedent, this Court should reject

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[3] Letter from Thomas Jefferson to James Monroe (August 9, 1788) *in* 13 THE PAPERS OF THOMAS JEFFERSON, March–7 October 1788, at 488–90 (Julian P. Boyd, ed., 1956), available at http://founders.archives.gov/documents/Jefferson/01-13-02-0369.

[4] S. REP. No. 103-111, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1894; *Actions H.R.1308 103rd Congress (1993-1994): Religious Freedom Restoration Act of 1993*, https://www.congress.gov/bill/103rdcongress/housebill/1308/actions.

Respondents' presumptive assertion of authority over Petitioners' religious exercise and find that the Preventive Care Mandate violates Petitioners' rights under RFRA.

I. RFRA RE-AFFIRMED THE PRE-EMINENCE OF RELIGIOUS FREEDOM IN THE UNITED STATES AS ESTABLISHED BY THE FOUNDERS.

A. The Content and Context of RFRA Demonstrate Congress' Commitment to Rigorous Protection of Religious Freedom.

Concerned about the ramifications that this Court's decision in *Smith* would have on religious free exercise, Congress acted quickly and nearly unanimously to enact RFRA.[5] The law is extraordinary because it not only had bipartisan sponsorship and passage in Congress, but also brought together diverse organizations that are otherwise at odds. Organizations as dissimilar as People for the American Way, the U.S. Conference of Catholic Bishops, National Association of Evangelicals and the ACLU testified in favor of RFRA before

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5 *Actions H.R.1308 103rd Congress.*

the Senate Judiciary Committee.[6] As one witness said:

> Never have I seen a coalition quite like the Coalition for the Free Exercise of Religion—People for the American Way, on the one hand; the Traditional Values Coalition and Concerned Women for America, on the other; the

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[6] *The Religious Freedom Restoration Act: Hearing Before the Senate Committee on the Judiciary,* 102nd Cong. 30-237 (1992) (Statements of panels consisting Of Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-Day Saints, Salt Lake City, UT; Oliver S. Thomas, General Counsel, Baptist Joint Committee on Public Affairs, Washington, DC; Douglas Laycock, Professor, University of Texas School of Law; Mark E. Chopko, General Counsel, U.S. Catholic Conference, Washington, DC; Bruce Fein, Great Falls, VA, Forest D. Montgomery, Counsel, Office of Public Affairs, National Association of Evangelicals, Washington, DC; Michael P. Farris, President, Home School Legal Defense Association, Paeonian Springs, VA; Nadine Strossen, President, American Civil Liberties Union; and James Bopp, Jr., General Counsel, National Right To Life Committee, Inc., Washington, DC).

> American Civil Liberties Union, the Southern Baptist Convention, Agudath Israel, and the American Muslim Council; 54 organizations, Mr. Chairman, 54 organizations willing to set aside their deep political and ideological differences in order to unite in a common vision for the common good—religious liberty for all Americans. Let us face it. What else can Nadine Strossen, Paul Wyrick [sic], Norman Lear, and Beverly LaHay[sic] agree on?[7]

What those divergent groups agreed on is the pre-eminent importance of religious freedom to the fabric of the United States:

> We disagree on the outcome of many, many cases, and on a lot of issues, especially religious freedom, but we share an unwavering commitment to the principle of the free exercise of religion and that it should be treated as a fundamental freedom. This is one of those bedrock principles that virtually all

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[7] *Id.* at 41 (Statement of Oliver S. Thomas).

> Americans share, regardless of our political or religious affiliations.[8]

Similarly, virtually all members of Congress voted for RFRA, agreeing that:

> Many of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American. That right is enshrined in the free exercise clause of the first amendment, which provides that "Congress shall make no law *** prohibiting the free exercise [of religion]."[9]

Congress recognized that:

> This fundamental constitutional right may be undermined not only by Government actions singling out religious activities for special burdens, but by governmental rules

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[8] *Id.* at 148 (Statement of Michael P. Farris).

[9] S. REP. No. 103-111, at 5.

> of general applicability which operate to place substantial burdens on individuals' ability to practice their faiths.[10]

Therefore, Congress enacted RFRA:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is burdened; and (2) to provide a claim or defense to persons whose religious exercise is burdened by government.[11]

Buoyed by the support of organizations and legislators at both ends of the political spectrum, Congress explicitly re-instated the most rigorous constitutional scrutiny for government policies that substantially burden religious free exercise, thereby affirming the pre-eminent place that religious freedom has occupied and continues to occupy in the Republic. That pre-eminent right cannot be commandeered by government administrators claiming to know better than religious

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10 *Id.*

11 *Id.* at 4.

adherents what is burdensome to their free exercise rights.

B. Congress' Rigorous Protection of Religious Freedom Reinforces the Pre-eminent Place Given to Religious Freedom by The Founders.

As Congress noted when it enacted RFRA, protection of religious freedom is a cornerstone upon which the Republic was built, and the potential for governmental interference with religious exercise was a pre-eminent concern for the Founders. From the early days of the Republic, Americans opposed government support of religion and argued that freedom to exercise one's chosen religion is a natural, unalienable right.[12]

James Madison successfully advocated for strengthening the religious freedom protection language in Virginia's 1776 Declaration of Rights, which was a model for the federal Bill of Rights. Initially, the language provided for the "fullest toleration in the exercise of religion," but at Madison's

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[12] Corey A. Ciocchetti, *Religious Freedom And Closely Held Corporations: The Hobby Lobby Case And Its Ethical Implications*, 93 OR. L. REV. 259, 275 (2014).

urging it was changed to provide that "all men are entitled to the full and free exercise of religion."[13] In 1779, Thomas Jefferson drafted the Virginia Act for Establishing Religious Freedom, which guaranteed equality to all Virginia citizens regardless of religion:

> We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[14]

Echoing Jefferson's concerns, Madison emphasized the inalienability of religious exercise in his famous 1785 Memorial and

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13 *Id.*

14 *Id.* at 276. The bill was passed in 1786. *Id.*

Remonstrance Against Religious Assessments, which stated, *inter alia*:[15]

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right

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[15] James Madison, Memorial and Remonstrance against Religious Assessments, [ca. June 20] 1785," in 8 THE PAPERS OF JAMES MADISON, March 10, 1784 – March 28, 1786, 295–306 (Robert A. Rutland & William M. E. Rachal eds., 1973) http://founders.archives.gov /documents/Madison /0108020163.

> towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.[16]

In other words, as Jefferson said many times in the early days of the Republic, "No power over the freedom of religion . . .[is] delegated to the United States by the Constitution."[17] Jefferson emphasized the importance of protecting religious freedom from government interference in a 1788 letter to James Monroe:

> This constitution forms a basis which is good, but not perfect. I hope the states will annex to it a bill of rights securing those which are essential against the federal government; particularly trial by jury, habeas corpus, freedom of religion, freedom of the press,

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16 *Id.*

17 David Barton, ORIGINAL INTENT, 44 (4th ed. 2005), citing Kentucky Resolution, 1798, in THE JEFFERSONIAN CYCLOPEDIA, 977 (John P. Foley, ed. 1900).

> freedom against monopolies, and no standing armies.[18]

Similarly, in 1790, Jefferson wrote to Noah Webster:

> It had become an universal and almost uncontroverted position in the several states, that the purposes of society do not require a surrender of all our rights to our ordinary governors: that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly incroaching [sic] on, if submitted to them. That there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shewn a disposition to weaken and remove. Of the first kind for instance is

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[18] Letter from Thomas Jefferson to James Monroe (August 9. 1788), 13 THE PAPERS OF THOMAS JEFFERSON, March–7 October 1788, 488-90 (Julian P. Boyd, ed. 1956), http://founders.archives.gov/documents/Jefferson/01-13-02-0369

> freedom of religion: of the second, trial by jury, Habeas corpus laws, free presses.[19]

Jefferson emphasized the adverse consequences of forgetting from Whom the freedom of religion is derived:

> And can the liberties of a nation be thought secure if we have lost the only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?[20]

It is from that perspective that Jefferson wrote his famous letter to the Danbury Baptists in 1802:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes

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[19] Letter from Thomas Jefferson to Noah Webster, Jr., (December 4 1790), *in* 18 THE PAPERS OF THOMAS JEFFERSON, November 4, 1790–January 24, 1791, 131-35 (Julian P. Boyd, ed., 1971), http://founders.archives.gov /documents /Jefferson/01-18-02-0091.

[20] Barton at 46, *citing* Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA, Query XVIII, 237 (1794).

> account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[21]

Historian David Barton explains that "Jefferson's reference to 'natural rights' invoked an important legal phrase which was part of the rhetoric of that day. The use of that phrase

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[21] Letter from Thomas Jefferson to the Danbury Baptists (January 1, 1802) *in* 57 *Library of Congress Information Bulletin* (June 1998), https://www.loc.gov/loc/lcib/9806/danpre.Html.

confirmed his belief that religious liberties were inalienable rights."[22] So, Jefferson was affirming to the Danbury Baptists that the free exercise of religion was their inalienable God-given right.[23]

Jefferson reiterated that sentiment in his second Inaugural address in 1805: "In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the general [federal] government."[24] Finally, in 1808, Jefferson explicitly affirmed that "our excellent Constitution…has not placed our religious rights under the power of any public functionary."[25] "I consider the government of the United States as interdicted [prohibited] by the Constitution from intermeddling with religious institutions…or exercises."[26]

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22 Barton at 46.

23 *Id.*

24 *Id., citing* Thomas Jefferson, *Second Inaugural Address* (March 4, 1805), *in* 8 ANNALS OF CONG. 78 (1852).

25 *Id.*, citing Letter from Thomas Jefferson to the Methodist Episcopal Church (December 9, 1808) *in* 16 WRITINGS OF THOMAS JEFFERSON 325 (Albert Ellery Bergh, ed. 1904).

26 *Id.*, citing Letter from Thomas Jefferson to Samuel Miller (January 23, 1808) *in* 4 MEMOIR, CORRESPONDENCE, AND

It is this perspective of religious freedom as the "first freedom"[27] that Congress sought to reinstate when it enacted RFRA.

> For us in the United States, religious freedom is our "first freedom," not in the sense that it happens to appear in our "First Amendment" but, more importantly, because the meaningful embrace and protection of political rights and civil liberties depends on the meaningful embrace and protection of religious freedom. A government that refuses to recognize and concede its limits is not likely to consistently subordinate its own projects and interests to competing claims of free speech, privacy, or due process. Whether or not we are religious believers, we all have a stake in religious freedom.[28]

MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON, 103-04 (Thomas Jefferson Randolph, ed. 1830).

[27] Posting of Richard Garnett to SCOTUSblog Symposium: *Integrity, mission, and the Little Sisters of the Poor* (Dec. 17, 2015, 4:52 PM EST).

[28] *Id.*

The Founders' zealous protection of religious free exercise reflects the fact that religious freedom is more than the legal right of individual persons to believe (or not) what they like or to worship (or not) as they choose.[29]

> It is a moral right that every person–because he or she is a person–enjoys and that any morally legitimate political authority is bound to respect.…It is as much about the right to educate children, care for the sick, and serve the poor as it is about prayer, ritual, and worship. The right to practice one's religion is, obviously, not absolute; the government may and should preserve public order and promote the common good. However, the "common good" is not a regulatory blank check.… Accordingly, a government imposed constraint or significant burden on peaceful religious practices requires some justification beyond the assertions by "the state" or "the experts" or "the majority" that it is warranted or convenient.[30]

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29 *Id.*

30 *Id.*

Petitioners here exemplify the Founders' broad view of religious free exercise, engaging in peaceful religious practices such as caring for the sick and poor (Little Sisters of the Poor), educating young people (East Texas Baptist and Southern Nazarene universities and Geneva College) and protecting the unborn (Priests for Life). Respondents cannot justify their Hobson's choice of religious beliefs or punitive fines by asserting a newly minted "right" of free employer-provided contraceptives, which in reality is nothing more than a convenience.

While providing free contraception might be convenient for employees, it is not necessary for public order or the common good so as to justify what Petitioners have determined is a substantial burden on their free exercise of religion. RFRA and the Founders make clear that it is *Petitioners*, not Respondents, who determine whether the Preventive Care Mandate substantially burdens their religious exercise, and Respondents' attempt to second guess that determination through purported "accommodations" must be rejected.

II. THIS COURT'S PRECEDENTS SUPPORT PRESERVATION OF RELIGIOUS ADHERENTS' RIGHT TO DEFINE "SUBSTANTIAL BURDEN" AS PART OF PROTECTING RELIGIOUS FREEDOM FROM GOVERNMENT INTERFERENCE.

Even as this Court moved from its early affirmation of Jefferson's interpretation of religious freedom protection to adoption of the "misleading metaphor" of "separation of church and state,"[31] it remained vigilant in its protection of religious adherents' beliefs from government scrutiny. Although it adopted a more deferential standard of review for certain religious practices, *i.e.*, sacramental use of controlled substances, this Court maintained its prohibition against government inquiry into the validity or centrality of an adherent's beliefs. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990). "Repeatedly and in many different contexts, [this Court has] warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* From the early days of the Republic to today, this Court has steadfastly

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[31] *Wallace v. Jaffree,* 472 U.S. 38, 92 (1984) (Rehnquist, J., dissenting).

maintained that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* That is as true for challenges of the Preventive Care Mandate under RFRA, *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751, 2778 (2014), as it is for challenges to employment mandates under the First Amendment. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981).

A. This Court's Pre-*Everson* Precedents Established That Religious Exercise Was To Be Free From Government Intrusion.

Less than 100 years after the Bill of Rights was ratified in 1791, this Court ratified the Founders' determination that religious free exercise is an inalienable right not subject to government analysis or judgment. *Watson v. Jones*, 13 Wall. 679, 727 (1872). In *Watson,* the Court refused to second-guess a denomination's determination that an anti-slavery faction owned church property. *Id.* Applying a "broad and sound view of the relations of church and state under our system of laws," the Court explained that "whenever the questions of discipline, or of faith, or ecclesiastical rule,

custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." *Id.*

Any question about the Founders' intentions regarding religious freedom vis-à-vis government oversight, particularly Jefferson's intention in his 1802 letter to the Danbury Baptists, was answered by this Court in *Reynolds v. United States*, 98 U.S. 145, 162-63 (1878). The Court recalled the early days of the Republic when some of the colonies and States attempted to legislate doctrines and precepts, and, similarly to the Preventive Care Mandate, punish those who held what the state determined to be "heretical opinions." *Id.* at 162. Those controversies are what prompted Madison to write his Memorial and Remonstrance and Jefferson to compose his Virginia Act for Establishing Religious Freedom and letter to the Danbury Baptists asserting that government would not interfere with religion. *See id; see also, discussion at* Section IB. Citing to Jefferson's letter to the Danbury Baptists, this Court said that the free exercise clause of the First Amendment deprived Congress of "all legislative power over mere opinion," leaving it free only to regulate actions that "were in violation of social duties or subversive of good order," such as polygamy. *Id.* at 164. "Laws are made for the government

of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. In other words, the government cannot interfere with sincerely held religious beliefs, such as Petitioners' beliefs that certain contraceptives act as abortifacients and therefore violate the commandment against murder and cannot be in any way facilitated or sanctioned.

This Court confirmed the pre-eminent place of religious exercise in *Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892). In striking down a lower court's interpretation of an immigration statute to prohibit the hiring of a minister from England, the Court said:

> [N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.

Id. Noting that the U.S. Constitution and all (then) 44 state constitutions protected religious liberty, the Court said, "[t]hey affirm and reaffirm that this is a religious nation." *Id.* at 470. "These are not individual sayings, declarations of private persons. They are

organic utterances. They speak the voice of the entire people." *Id.* Based upon that unified voice, the Court found that a statute regulating the importation of foreign workers could not be used against a church seeking to hire a minister from another country. *Id.*

As this Court said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Particularly relevant to the Respondents' assertion of authority over Petitioners' beliefs regarding contraceptives is the Court's conclusion that a Jehovah's Witness could not be compelled to salute the flag because:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Id. at 642. Similarly here, Respondents' attempt to compel Petitioners to facilitate the provision of what Petitioners believe are abortifacient drugs impermissibly invades the sphere of intellect and spirit that the First Amendment has reserved from official control.

Citing *Barnette,* this Court reiterated that "[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men" in *United States v. Ballard*, 322 U.S. 78, 86 (1944). "It embraces the right to maintain theories of life and of death and of the

hereafter which are rank heresy to followers of the orthodox faiths." *Id.* "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." *Id.* Therefore, "[w]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury." *Id.* Neither can the sincerity of Petitioners' beliefs and the extent of the burden upon them by forced spending on contraceptives be submitted to Respondents.

B. *Everson*'s Misapplication Of Jefferson's "Wall Of Separation" Did Not Alter The Court's Protection Of Religion Adherents' Right To Define Their Own Beliefs.

In 1947 this Court transmorphed Jefferson's "wall of separation," from a limitation placed upon government by the Free Exercise Clause to a limitation on religious expression in public under the Establishment Clause. *Everson v. Bd. Of Educ.,* 330 U.S. 1, 16 (1947). As a result, the "Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years" (now nearly 70 years), *Wallace*, 472 U.S. at 92

(Rehnquist, J. dissenting). However, that shift in perspective did not diminish this Court's protection of religious adherents' right to be free from government scrutiny of the centrality and validity of their beliefs, as the post-*Everson* cases illustrate.

In 1952, this Court cited the opinion in *Watson* as radiating "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116, (1952). Similarly, in *Fowler v. State of R.I.*, 345 U.S. 67, 69-70 (1953), the Court invalidated a city ordinance restricting religious speeches but not sermons in a public park as violative of the foundational precept that government cannot intrude into religious beliefs. "It is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Id.* "Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id.* "To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an

indirect way of preferring one religion over another." *Id.*

Indeed this Court has consistently said that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such," *Sherbert v. Verner*, 374 U.S. 398, 402 (1963), citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "Government may neither compel affirmation of a repugnant belief,…nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities,…nor employ the taxing power to inhibit the dissemination of particular religious views." *Id.* (internal citations omitted). While noting that the Court has at times rejected Free Exercise challenges to overt acts motivated by religious belief, it specified that such acts "invariably posed some substantial threat to public safety, peace or order," such as polygamy, refusing smallpox vaccination or transporting women across state lines for "immoral purposes." *Id.* at 403, citing *Reynolds*, 98 U.S. at 164; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Cleveland v. United States*, 329 U.S. 14 (1946). Refusing to work on Saturday because of a sincerely held religious belief that it is the Sabbath did not represent such a threat to public order and the common good. *Id.* at 403. Therefore, it was not analogous to *Reynolds, Jacobson* and *Cleveland*

and could not be subject to government sanction. *Id.*

In *Sherbert,* the Court analyzed the question of whether denial of unemployment benefits for refusal to work on Saturday posed a substantial burden without performing a litmus test on plaintiff's beliefs. Instead, accepting that plaintiff believed that working on Saturday violated her religious beliefs, the Court looked at whether denying benefits for refusing to work imposed a burden on her ability to exercise those beliefs. *Id.* The Court found an unmistakable burden in a Hobson's choice quite similar to the choice facing Petitioners here. *Id.* at 404.

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed

> against appellant for her Saturday worship.

Id. The fine referred to in *Sherbert* is precisely what Petitioners are facing here under Respondents' Preventive Care Mandate. As was true of the government sanction in *Sherbert*, the choice between compromising religious beliefs or paying punitive fines in the Preventive Care Mandate unmistakably burdens Petitioners' free exercise rights.

This Court offered an extensive and particularly relevant discussion of the permissible extent of examination of religious beliefs in *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). In *Thomas*, a Jehovah's Witness was fired when he refused to work on armaments because he understood that such work violated the religious tenets of his faith. *Id.* at 715-16. The lower court had rejected his claim based in part on testimony from another Jehovah's Witness who said that working on armaments was, in his mind, scripturally acceptable. *Id.* This Court rejected the lower court's parsing of the adherents' beliefs and reiterated that the resolution of what is a religious belief or practice cannot turn on "a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

> We see, therefore, that 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 because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the

> commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-16 (emphasis added). Likewise, administrative agencies should not undertake, as Respondents have done here, to dissect religious beliefs or to solve intra-faith disputes regarding the propriety of a particular practice. It is not within Respondents' administrative function and competence to inquire whether Petitioners correctly perceived the commands of their faith. As is true of courts, Respondents "are not arbiters of scriptural interpretation." *See id.* at 716.

As this Court established in *Sherbert* and *Thomas*, determination of whether a particular regulation imposes a substantial burden is not dependent upon a subjective review of religious beliefs, but on an objective review of the relationship between the regulation and adherents' religious exercise. *Thomas,* 450 U.S. at 717-18.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify

> his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. See also, Sherbert, 374 U.S. at 404. Here, the pressure on Petitioners to forgo religious beliefs to avoid government sanction is an unmistakable substantial burden on religious exercise. Respondents cannot arrogate to themselves the right to assess the validity of Petitioners' determination that their beliefs are substantially burdened by having to comply with the Preventive Care Mandate and to facilitate the purchase of certain contraceptives.

C. *Employment Division v. Smith*'s Revision Of The Compelling Interest Test Did Not Alter The Court's Protection Of Religion Adherents' Right To Define Their Own Beliefs.

Even while adopting a more deferential test for certain free exercise challenges of generally applicable laws, this Court affirmed that religious adherents' beliefs are not subject to government second-guessing. *Employment*

Div. v. Smith, 494 U.S. 872, 886-87 (1990). In *Smith*, this Court said that *Sherbert*'s compelling interest standard should not be used for free exercise challenges to criminal laws. *Id.* at 885. The Court said that the "compelling interest" test should not be applied to such challenges because of the government's need to "enforce generally applicable prohibitions of socially harmful conduct," such as use of illicit drugs, without measuring the effects "on a religious objector's spiritual development." *Id.*

That does not mean, however, that the government is free to second guess the nature and veracity of adherents' beliefs. *Id.* at 886-87. The Court specifically rejected an argument that the "compelling state interest" test should be used when the conduct prohibited is "central" to the individual's religion. *Id.* at 886.

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a

> particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." *United States v. Lee,* 455 U.S., at 263 n. 2, 102 S.Ct., at 1058 n. 2 (STEVENS, J., concurring).

Id. at 886-87. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 887, citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Citing to, *inter alia, Thomas* and *Ballard,* the Court affirmed that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* The Court further confirmed that protection of religious free exercise means continued vigilance against coercion or suppression of religious beliefs by attempting to categorize the relative importance of various issues. *Id.* at 888.

Consequently, this Court has made clear that modifying the test for generally applicable laws that affect religious exercise did not grant the government carte blanche to determine

whether and which of adherents' beliefs are genuine and/or critical to their right of free exercise.

D. This Court Has Explicitly Rejected The Idea That The Government Can Determine Whether The Preventive Care Mandate Imposes A Substantial Burden.

This Court has already rejected Respondents' attempt to second-guess religious adherents' determination that the Preventive Care Mandate imposes a substantial burden on their sincerely held religious beliefs, or as one commentator concluded, tramples on "employers' freedom to conduct their business in harmony with their religious beliefs."[32] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014). The Court reiterated that RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and "mandate[s] that this concept be construed in favor of a broad protection of religious exercise." *Id.* at 2762. What is true of Hobby Lobby as a faith-based

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[32] Emily Pitt Mattingly, "*Hobby-Lobby"-ing For Religious Freedom: Crafting The Religious Employer Exemption To The PPACA*, 102 KY. L.J. 183, 185 (2014).

for-profit corporation is equally true for Petitioners as faith-based non-profit organizations. As it did in *Hobby Lobby*, this Court should reject Respondents' attempt to act as arbiter of what substantially burdens Petitioners' religious beliefs.

In *Hobby Lobby*, this Court rejected Respondents' argument that the Preventive Care Mandate does not impose a substantial burden on the exercise of religion because the employers' action in facilitating the purchase of contraceptives is "too attenuated" from their moral objection to abortifacient drugs. *Id.* at 2777. Citing to *Smith*, the Court explained in detail the error in Respondents' attempt to arbitrate whether the Preventive Care Mandate substantially burdened the employers' free exercise rights under RFRA:

> The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but

> that has the effect of enabling or facilitating the commission of an immoral act by another. *Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step*. *See, e.g., Smith*, 494 U.S., at 887, 110 S.Ct. 1595 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim")….

Id. at 2778 (emphasis added). This Court also explained that it considered and rejected a similar argument in *Thomas*, where the Court held that "it is not for us to say that the line he[Thomas] drew was an unreasonable one." *Id.*, citing *Thomas*, 450 U.S. at 715. Similarly, in *Hobby Lobby*:

> [T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken

> or insubstantial. Instead, our "narrow function ... in this context is to determine" whether the line drawn reflects "an honest conviction," *id.*, [*Thomas,* 450 U.S.] at 716, 101 S.Ct. 1425, and there is no dispute that it does.

Id., at 2779. That being the case, the imposition of fines representing "an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

What was true for the for-profit faith-based organizations in *Hobby Lobby* is true for the non-profit faith-based organizations here. The organizations have drawn a line based upon honest convictions that facilitating or directly funding the purchase of certain contraceptives is prohibited by their faith, and the drawing of that line will result in the imposition of substantial sums of money under the Preventive Care Mandate. Consequently, the Mandate imposes a substantial burden upon Petitioners' free exercise rights. Respondents cannot arrogate to themselves the authority to second guess that conclusion by constructing "accommodations" and

unilaterally asserting that they sufficiently address Petitioners' beliefs.

As this Court did in *Hobby Lobby*, it should refuse to take that step and reject Respondents' attempt to once again second guess the veracity of Petitioners' beliefs. This Court should affirm its finding in *Hobby Lobby* that:

> [T]he federal courts may not arrogate unto themselves the authority to answer the "religious and philosophical question" of the "circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[33]

This Court should apply *Hobby Lobby* to this case to find that "once the Little Sisters of the Poor have decided as a matter of moral judgment that facilitating the delivery of abortifacients by signing the HHS form is to be complicit in the sin, Article III judges lack the

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[33] Posting of John Bursch to SCOTUSblog Symposium: Contraceptive mandate cases – why the Supreme Court will instruct lower federal courts to stop second guessing religious beliefs, SCOTUSBLOG (Dec. 14, 2015, 5:45 PM).

constitutional authority to second guess that moral judgment and reach a different conclusion."[34]

That conclusion would be in keeping not only with *Hobby Lobby* and earlier precedents, but also with last term's *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015), in which this Court again rejected government's attempt to second-guess a religious adherent's assertion that a regulation substantially burdened the free exercise of his religion. In *Holt*, this Court analyzed an inmate's claim under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which applied RFRA's protections to institutionalized people and land use regulations. This Court said that that RLUIPA's "substantial burden" inquiry, like RFRA's, "asks whether the government has substantially burdened religious exercise…not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Id.* In addition, as is true with RFRA, with RLUIPA challenges the government cannot arrogate to itself the determination of the relative weight of the burden. *Id.* Finally, "the protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is "not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 862-63, citing *Thomas*, 450 U.S. at 715–16.

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34 *Id.*

CONCLUSION

From the Founding of the Republic to this Court's decision in *Hobby Lobby* religious freedom has been interwoven into the fabric of American society. As a result, the United States has stood as a beacon of protection for fundamental human rights, as observed by one legal commentator:

> A political community that respects the fundamental human right to religious freedom will, if possible, adjust its demands and accept some costs or inconvenience in order to avoid imposing burdens on sincere religious beliefs and good faith religious practices. What's more, it will deliberately take steps to lift such burdens where they exist and to help create a regulatory, social, and cultural environment that is conducive to the exercise of religious freedom and the flourishing of religious life.[35]

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[35] Posting of Richard Garnett to SCOTUSblog Symposium: *Integrity, mission, and the Little Sisters of the Poor* (Dec. 17, 2015, 4:52 PM EST).

Congress' adoption of RFRA is one of those steps aimed at maintaining the strong religious freedom foundation of the Republic.

"What the Little Sisters and the other religious nonprofits have done is simply invoked the protection of [that] near unanimously enacted federal statute that reflects the longstanding values of our own (and any decent) political community and the foundations of human rights law."[36] Respondents should not be permitted to undermine that foundation by seeking to appoint themselves arbiters of the nature and extent of Petitioners' religious beliefs.

This Court should reject Respondents' arrogation of authority and sustain the long-standing recognition of religious adherents' right to define their beliefs free from government intrusion.

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36 *Id.*

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