No. 13-354

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*

Respondents.

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch is participating as *amicus curiae* in this matter because it believes religious liberty and respect for sincerely held religious beliefs are profoundly important, yet under increasing threat by expanding government, as this case demonstrates.

SUMMARY OF THE ARGUMENT

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq*., applies to for-profit corporations like Hobby Lobby Stores, Inc. and Mardel, Inc. (collectively "Hobby Lobby"). The text of the RFRA makes the congressional intent unambiguously clear. Additionally, the Dictionary Act, subsequent congressional actions, and this Court's

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

precedents support applying the RFRA to for-profit corporations such as Hobby Lobby.

Applying the RFRA in this case as the U.S. Court of Appeals for Tenth Circuit ("Tenth Circuit") did, it is evident that Hobby Lobby's religious liberties are substantially burdened by the so-called "contraceptive mandate" requirement of the Affordable Care Act of 2010 ("ACA"). It is equally clear that the mandate cannot withstand strict scrutiny and therefore must be overturned.

ARGUMENT

I. THE CONGRESSIONAL INTENT OF THE RELIGIOUS FREEDOM RESTORATION ACT IS UNAMBIGUOUSLY CLEAR.

The ACA, Pub. L. No. 111-148, 124 Stat. 119, has been wholly controversial. This Court has spoken to a number of specific provisions and has reminded us that the

> [m]embers of this Court are vested with the authority to interpret the law; we posses neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Nat'l Fed'n v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

The challenged regulation, 78 Fed. Reg. 39,870, is not simply the consequence of poor political choices; it is the product of a dangerous entanglement of Congress and an Executive agency that ultimately tramples on religious liberties.

In an unprecedented grab for power, the U.S. Department of Health and Human Services ("HHS") has not only unilaterally authored, enacted, and changed the contraceptive mandate, but it now seeks to redefine a separate act of Congress – the Religious Freedom Restoration Act – to preserve its power grab. This simply cannot stand.

Our system of governance depends greatly on an adherence to three distinct spheres of power. In the words of James Madison, "an elective despotism was not the government we fought for; but one in which the powers of government should be so divided and balanced among the several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others." FEDERALIST NO. 58. Executive agencies are the furthest removed from the "will of the people." Only when they are kept in check by the Executive himself or Congress are they truly operating "for the people." In this case the Executive has backed Petitioners entirely. Congress, despite several attempts to amend or abolish the contraceptive mandate has failed to do so. As such, people harmed by the contraceptive mandate have turned to the judiciary as their last line of defense in pro-

tecting their religious liberties.[2] "It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature; in order, among other things, to keep the latter within the limits assigned to their authority." Alexander Hamilton, FEDERALIST NO. 78.

The Court's task in this case is quite simple: employ the ordinary canons of statutory construction to the RFRA. Doing so, the only logical conclusion the Court can reach is that Congress intended the RFRA to apply to for-profit corporations like Hobby Lobby. Once applied, the contraceptive mandate must fail against Hobby Lobby and similar for-profit corporations.

A. The Plain Meaning of Congress' Words Make Its Intent Clear.

There appears to be no dispute that the RFRA was intended to restore the compelling interest test to situations in which the government had "substantially burdened religious exercise without compelling justification." 42 U.S.C. § 2000bb(a). The debate is centered solely on whether the RFRA was intended

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[2] Legal counsel for Hobby Lobby maintains a website dedicated to the plentiful lawsuits against Petitioners regarding the contraceptive mandate. As of the beginning of 2014 there are 91 lawsuits, including two class action lawsuits and over 300 plaintiffs. *See* becketfund.org/hhsinformationcentral/.

by Congress to apply to for-profit corporations. *See* Petitioners' Petition For A Writ Of Certiorari ("Petitioners' Writ") at 16; *see also Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1133 (10th Cir. 2013). Petitioners argue that the term "person" was not intended by Congress to include for-profit corporations like Hobby Lobby. Petitioners' Writ at 16-23. This argument is belied by Congress' own words.

First, in articulating the purpose of the RFRA, Congress stated that the application of the compelling interest test set forth by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) was guaranteed in "***all cases*** where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). The Court should adhere to the plain meaning of "all cases" absent an implausible or contradictory result. "As in any statutory construction, 'we start, of course, with the statutory text,' and proceed from the understanding that 'unless otherwise defined, statutory terms are generally interpreted with their ordinary meaning.'" *Sebelius v. Cloer*, 133 S. Ct 1888, 1893 (2013) (*quoting BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). *See also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 98 (2003).

Second, in the applicability section of the RFRA, Congress states that the RFRA applies to "all Federal law … whether statutory or otherwise, and whether adopted before or after the enactment." 42 U.S.C. § 2000bb-3(a). Petitioners argue that Congress intended to return to pre-*Smith* jurisprudence and ask this Court to simply erase post-*Smith* juris-

prudence. Petitioners' Writ at 17-20.[3] However, Congress' words are unambiguous that the RFRA should apply to "all Federal law" and should apply to all federal laws "before and after the enactment." It could not be clearer that Congress intended the RFRA to apply liberally. The rule of law adhered to by this Court is to presume Congress understands the words it writes. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *See Carr v. U.S.*, 560 U.S. 438, 458 (2010)

Lastly is the consideration of the term "person." Petitioners expend a great amount of time and energy attempting to convince the Court that, despite the inclusive language in the RFRA itself, Congress did not intend "person" to include for-profit corporations like Hobby Lobby for the purposes of RFRA protection. Petitioners' theory faces two insurmountable problems. First, Congress has created a default definition of the term "person" for use in any enactment in which the term is not defined specifically or alternatively. The Dictionary Act of 1947 defines "person" as including "corporations, companies, associations, firms, partnerships, societies and joint stock companies." 1 U.S.C. § 1. Second, Congress chose the term "person" rather

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[3] In *Employment Div. v. Smith*, 494 U.S. 872, 883-890 (1990), this Court held that the government may burden religious practices through "generally applicable laws" and decided that a "case-by-case assessment" was "unnecessary where the burden was caused by facially constitutional laws." The RFRA was Congress' response to *Smith*.

than the term "individual" in the RFRA. The Court has held that this distinction is not insignificant. In *Mohammed v. Palestinian Authority,* 132 S. Ct. 1702, 1707 (2012), the Court stated that it "routinely uses 'individual' to denote a natural person, and in particular to distinguish between a natural person and a corporation. Congress does not, in the ordinary course, employ the word any differently." (internal citations omitted). *See also Federal Communications Com'n v. AT&T,* 131 S. Ct. 1177 (2011) (affirming use of Dictionary Act's definition of the term "person").

B. Congress' Subsequent Actions Further Support the Clear Intent of the RFRA.

Congress passed the RFRA in 1993. Since that time there have been several amendments to the Act; no amendments have been made, however, to the Act's definition of the term "person." In the twenty years that have passed since the Act's enactment, Congress has rested on its original plain meaning of "person." Even after this Court expressly affirmed First Amendment protections for for-profit corporations in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), Congress did not attempt to alter the term "person" in the RFRA or the Dictionary Act.

It is undisputable that Congress ought to be the author of its intent. It is not for Petitioners to suggest, invent or redefine an intent which is manifestly at odds with the plain meaning of the words

chosen by Congress as well as subsequent congressional action and inaction. See *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) ("The judiciary is the final authority on issues of statutory construction and *must reject* administrative constructions that are contrary to clear congressional intent.") (emphasis added).

This is where the judicial inquiry should end regarding the congressional intent behind the RFRA, for when the "words of the statute are unambiguous then, the first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. U.S.*, 449 U.S. 424, 430 (1981)).

It is important to note, however, that this Court's precedents affirm the congressional intent of applying the term "person" to for-profit corporations like Hobby Lobby in the context of the RFRA. First, as shown above, the Court has applied the Dictionary Act in cases involving statutory construction when the term was not alternatively defined in the law at issue. See e.g., *Fed'l Communications Commission v. AT&T*, 131 S. Ct. at 1182; *Mohammed*, 132 S. Ct. at 1707. Second, this Court has explicitly extended First Amendment protection to corporations in both the for-profit and non-profit settings. *See e.g., Citizens United,* 558 U.S. at 342 (affirming First Amendment protection to for-profit corporations); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778, (1978) ("The inherent worth of speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individu-

al."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends."); *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 476-77 (2007) (recognizing the 501(c)(4) corporation's First Amendment rights and applying the strict scrutiny test to the restrictive law).

Considering the plain meaning of Congress' words in the RFRA, Congress' actions subsequent to passing the RFRA, and this Court's precedents, it is unmistakable that the RFRA applies to for-profit corporations like Hobby Lobby.

II. PETITIONERS' CONTRACEPTIVE MANDATE HAS SUBSTANTIALLY BURDENED THE RELIGIOUS LIBERTIES OF FOR-PROFIT BUSINESSES LIKE HOBBY LOBBY, AND THE COMPELLING INTEREST TEST CLEARLY WEIGHS IN FAVOR OF HOBBY LOBBY.

The "compelling interest test" has its roots in this Court's *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) decisions. Congress reiterated the compelling interest test in the RFRA and reaffirmed its use in all cases in which free exercise is substantially burdened. 42 U.S.C. § 2000bb(b). The only exception to this

prohibition on the free exercise of religion is when the government can demonstrate the law furthers a "compelling government interest and" that the law is the "least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b); *See also Gonzalez v. O Centro Espirita*, 546 U.S. 418, 424 (2006).

A. Hobby Lobby's Religious Liberties Are Substantially Burdened By the Contraceptive Mandate.

The Tenth Circuit used a three-part analysis to determine whether the contraceptive mandate substantially burdens Hobby Lobby's religious liberties. First, it identified the religious belief at issue. Second, it determined whether that belief was sincere. And third, it resolved the question of whether Petitioners' contraceptive mandate placed substantial pressure on Hobby Lobby. *Hobby Lobby*, 723 F.3d at 1140. The first two inquiries are not and have never been at issue. *See id*. Hobby Lobby's religious belief is clear – that life begins at conception and any action taken to end that life is morally wrong. Petitioner has never questioned the sincerity of Hobby Lobby's belief. *See id*. The only conflict between the two parties is whether the mandate places substantial pressure on Hobby Lobby and similar for-profit corporations.

This Court has already ruled on the matter and in *Sherbert* held that even an indirect burden can be deemed substantial if the pressure exerted by

the law or rule requires the person to choose between fidelity to his or her faith or economic benefits. *Sherbert*, 374 U.S. at 404. Surely this works to protect against loss as well – even an indirect burden can be deemed substantial if it requires the person to choose between fidelity to his or her faith or the imposition of unimaginable fines. *Hobby Lobby*, 723 F.3d at 1141.

Petitioners do not dispute that a failure on Hobby Lobby's part to adhere fully to the contraceptive mandate will result in millions of dollars in fees. Instead, Petitioners attempt to convince the Court that the burden is too attenuated because the money paid by Hobby Lobby is too far removed from the actual purchase of contraception. Not only does this disregard this Court's reasoning in *Sherbert*, it also defies the basic principle of religious liberties: it is not "whether the reasonable observer would consider the plaintiff's complicit in an immoral act, but rather how the plaintiff's themselves measure their degree of complicity." *Hobby Lobby*, 723 F.3d at 1142. It is not for Petitioners to decide whether Hobby Lobby is wrong in its religious belief.[4]

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[4] This Court has been very clear that it is contrary to the fundamental purpose of the free exercise right for the government to make judgments on the "worth" of particular religious beliefs. *See e.g., Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (religious organizations maintain the "power to decide for themselves … matters of church government as well as those of faith and doctrine.").

B. Petitioners' Stated Government Interest Does Not Rise to the Level of Compelling.

Once it has been established that Hobby Lobby's religious liberties have been substantially burdened by the contraceptive mandate, the only way Petitioners can defend the application of the law to Hobby Lobby is by demonstrating that its interest is compelling. As this Court has held, compelling does not simply mean important. The government's interest must also rise above a vague or overly general interest. See *Yoder*, 406 U.S. at 221 ("Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases; we must searchingly examine the interests that the State seeks to promote by its requirement."). The stated government interest in this case is the "promotion of public health." *See* Petitioners' Writ at 27. Perhaps seeing how general and vague such an interest is, Petitioners added that the contraceptive mandate specifically was a "key component" of the preventative health services of the ACA because "a lack of contraception use has proven in many cases to have negative health consequences" and because of the need for women to have "equal access to health-care services." *Id*. at 28. Setting aside the question of whether that medical information is as "proven" as Petitioners suggest, it still does not rise to the level of a compelling interest.

First, the stated interest is too vague and general to be considered compelling. As this Court

held in *Yoder*, even a strong interest may fail to rise to the level of a "compelling" interest if the government cannot demonstrate with particularity how that interest would be "adversely affected by granting the exemption." *Yoder*, 406 U.S. at 236. Petitioners offer plenty of anecdotal scenarios and general medical information, but they completely fail to demonstrate how granting an exemption for Hobby Lobby and other similar for-profit corporations will affect their broad goals. There is simply no direct or particular correlation.

Second, the contraceptive mandate itself negates the label "compelling" by permitting a number of exemptions. Following closely the death-knell generality of Petitioners' interest is the fact that Petitioners have already granted a large number of exemptions. Several of these exemptions had nothing to do with the contraceptive mandate specifically – grandfathered plans and very small businesses with less than 50 employees – but Petitioners specifically exempted many other businesses for the exact reason Hobby Lobby now seeks an exemption – a clearly defined religious belief that life begins at conception. In fact, Petitioners have expanded the universe of those businesses exempt from the contraceptive mandate for religious reasons on multiple, separate times, and, through the Advanced Notice of Proposed Rulemaking ("ANPRM") of March 21, 2012, even sought to "protect . . . religious organizations from having to contract, arrange, or pay for contraceptive coverage." *Geneva College v. Sebelius*, 2012 U.S. Dist. LEXIS 179476 (W.D. Pa, December 23, 2013) (quoting 77 Fed. Reg. 16,503). Clearly, Peti-

tioners were well aware of the conflict that the contraceptive mandate would cause those espousing certain religious beliefs. In fact, they were aware enough that they carved out exemptions.

It is simply untenable for Petitioners to turn around and claim that for-profit corporations like Hobby Lobby should not be granted the same religious exemption that they have already granted many others. In *Gonzalez*, this Court noted that precluding one group of people from exerting an already recognized religious exemption to the very same law that another group already enjoyed made the government's position very "difficult." *Gonzalez*, 546 U.S. at 433. Indeed, it makes Petitioners' position untenable. *See also Church of Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 547 ("'a law cannot be regarded as protecting an interest of the 'highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42, (1989)) (Scalia, J. concurring in part and concurring in judgment).

C. The Contraceptive Mandate Is Not the Least Restrictive Means of Achieving the Government's Interest.

Lastly, Petitioners have not offered a modicum of evidence that the contraceptive mandate is the least restrictive means of accomplishing their extraordinarily general interest. Petitioners only state that the "various forms of FDA-approved

contraceptives are not fungible." Petitioners' Writ at 32. Even were this true, it simply does not come close to carrying the least restrictive means burden. Hobby Lobby as well as several *amici* have offered reasonable and feasible alternatives to the contraceptive mandate that would not force Respondents and similar for-profit corporations to choose between violating their religious beliefs or pay crushing fines. *See* Brief for Respondents On Petition for Writ at 35.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the Tenth Circuit's decision.

Respectfully submitted,

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