Nos. 13-354 & 13-356

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.

CONESTOGA WOOD SPECIALTIES CORP, ET AL., PETITIONERS,

v.

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

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE HON. DANIEL H. BRANCH AS AMICUS CURIAE SUPPORTING RESPONDENTS IN CASE NO. 13-354 AND PETITIONERS IN CASE NO. 13-356

DANIEL H. BRANCH
Counsel of Record
3953 Maple Avenue
Suite 100
Dallas, TX 75219
dbranch@winstead.com
(214) 745-5888

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

INTEREST OF AMICUS CURIAE[1]

As a member of the House of Representatives for the State of Texas, it is my solemn responsibility to preserve and protect the constitutional rights of the citizens of Texas, including their right to freely exercise their sincere religious beliefs, as protected by the First Amendment to the United States Constitution.

In that role, I have written and fought for the passage of legislation recognizing the fundamental role that religion plays in the daily lives of Texans—and then worked with the Texas Attorney General's office to ensure that those laws were upheld in the courts. *See, e.g.*, TEX. EDUC. CODE § 25.082(d) ("each school district shall provide for the observance of one minute of silence . . . During the one-minute period, each student may . . . pray . . ."); *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010) (upholding moment of silence law).

I submit this amicus brief today to prevent the federal government from forcing employers, including many employers in Texas, to violate their heartfelt religious convictions.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the petitioners in both cases, and the respondents in Case No. 13-356, has filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs in support of either party. Counsel of record for the respondents in Case No. 13-354 has individually consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

The Patient Protection and Affordable Care Act of 2010 ("ACA") has already upended the limits on federal power set forth in the United States Constitution and intruded on the private lives of all Americans. *See Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2642-77 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

But this current presidential administration has chosen to go even further. It has now promulgated administrative regulations that require, among other things, certain employers to provide contraceptive coverage to their employees, even when doing so would violate the employers' sincere religious beliefs.

The HHS Mandate is plainly a violation of their First Amendment right to freely exercise their religious beliefs, as well as a substantial burden on religious exercise, in violation of the Religious Freedom Restoration Act ("RFRA")

As an initial matter, it is critical that the religious beliefs of the challengers to the administration's mandate—and, indeed, the beliefs of all conscientious objectors to this administration's mandate—goes unquestioned. It is simply not the role of the courts to second-guess sincerely held religious doctrine. And yet that precisely is what courts in these two cases have repeatedly done, and that approach must be soundly rejected.

Once the precise nature of the religious objections to the HHS Mandate is understood, the illegality of the mandate becomes readily apparent. The mandate commands employers to engage in practices that run directly contrary to their religious convictions, or suffer ruinous penalties. That is

plainly a substantial burden on religious exercise, in violation of RFRA.

Moreover, the HHS Mandate is *not* a rule of general applicability under the First Amendment, because, among other things, this Administration has excepted a number of other entities from its dictates for secular purposes—but refuses to do the same for those with sincere religious objections to the mandate.

Thus, the *only* way for the HHS Mandate to survive is if the Administration can justify it under strict scrutiny—which it cannot. Indeed, the mandate fails every single step of the strict scrutiny analysis: it does not serve a compelling interest; it does not advance the non-compelling interest the Administration has identified; and it is not narrowly tailored to serve that non-compelling interest.

The HHS Mandate is unconstitutional and illegal and must be struck down.

ARGUMENT

I. It Is Not The Role Of The Courts To Second-Guess The Sincerely Held Religious Beliefs Of Individuals Or Institutions.

Both the First Amendment and RFRA protect the right to freely exercise one's religious beliefs, against all manner of interference by the government—both explicit and subtle. These cases display both of these forms of government intrusion on religious liberty.

To begin with, the HHS Mandate coerces employers to either violate their own sincerely-held religious beliefs, or suffer significant financial penalties at the hands of the federal government.

Moreover, in upholding the HHS Mandate despite this direct intrusion on religious belief, the district

courts in these cases engaged themselves in a particularly pernicious form of religious oppression: Both courts purported to decide for the employers what they believe as a matter of faith, in the course of deciding whether or not the government had in fact trampled upon those beliefs.

In doing so, the district court violated this Court's repeated admonitions that it is emphatically *not* the role of the courts to second-guess the accuracy of an individual or institution's conviction that certain activities or beliefs are central to or required by their particular religious creed:

> [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. Repeatedly 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.

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 887 (1990) (quotations and citations omitted). *See also Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 144 n. 9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.").

It is difficult to imagine a more plain command: do not question sincerely held religious beliefs. And yet it is a command that the district courts in both of these cases ignored.

For example, consider how the Eastern District of

Pennsylvania attempted to characterize the religious beliefs animating the plaintiffs' objections in the *Conestoga Wood Specialties Corp.* case—and then, having moved the goalposts, dismissed any effect the HHS Mandate would have on the court's newly formulated interpretation of the plaintiffs' religious beliefs:

> **[T]he core of the Hahns' religious objection is the effect of particular contraceptives on a fertilized egg.** Given that focus, it is worth emphasizing that the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the Hahns, but with Conestoga's employees. The fact that Conestoga's employees are free to look outside of their insurance coverage and pay for and use any contraception, including abortifacients, through the salary they receive from Conestoga, amply illustrates this point.
>
> We also find that any burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will cover contraceptive services (and a wide range of other health care services); the abortifacients must be made available to Conestoga employees through a pharmacy or other healthcare facility; and a decision must be made by a Conestoga employee and her doctor, who may or may not choose to

> avail themselves to these services.

Conestoga Wood Specialities Corp. v. Sebelius, 917 F. Supp. 2d 394, 414-415 (E.D. Pa. 2013) (emphasis added).

The Western District of Oklahoma made a similar attempt to recharacterize the precise nature of the plaintiffs' religious beliefs before rejecting their challenge to the mandate:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned by plaintiff's religion.

Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012) (quotations and citation omitted).

As those passages reflect, the district courts essentially held that the plaintiffs—regardless of what they were telling the courts—should be deemed to in fact be challenging the HHS Mandate on the grounds that their "core" religious beliefs prohibited nothing more than the usage of particular contraceptives by any individual.

But not only was that beyond the power of the courts to determine, it was utterly incorrect. Both courts fundamentally misunderstood the religious principles that have animated many of the challenges to the HHS Mandate, including the ones at issue in these two cases.

Objectors to the HHS Mandate are not merely exercising some generalized objection to the usage of certain contraceptives—such that courts could explain away this objection by pointing to the alleged "attenuated circumstances" leading to the actual decision to use those contraceptive products by someone else.

Rather, the religious convictions of the challengers to the HHS Mandate actually prohibit them from being involved in the coverage of such contraceptives—that is to say, just facilitating (let alone paying for) that type of coverage is itself a violation of their core religious beliefs. *See, e.g.*, *Korte* v. *Sebelius*, 528 Fed. Appx. 583, 587 (7th Cir. 2012) ("The religious liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.") (emphasis in original).

Once the religious objections to the HHS Mandate in these cases are accurately understood—and not distorted in service of the Administration's objectives—the analysis employed by both district courts quickly fails.

Moreover, these cases illustrate precisely why courts should not be in the business of parsing private religious doctrine in the first place. *See, e.g.*, *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so.") (citing *Smith*, 494 U.S. at 887).

The sincere belief that compliance with the HHS Mandate is contrary to one's religious practice should go unquestioned—and, more to the point, should not

be rewritten by the courts. Instead, the question a court should ask is simple: Do the litigants sincerely believe in their stated religious doctrines, no matter what those doctrines may be? Here, the answer to that question is simple: yes.

But the district courts' actions in these two cases demonstrate, once again, the need for this Court to make clear that courts may not distort or rewrite the content of one's religious beliefs. The robust protection of religious liberty under the First Amendment and RFRA requires nothing less.

II. The HHS Mandate Is Subject To Strict Scrutiny Under The First Amendment Because It Is Not A Rule Of General Applicability.

Under the First Amendment, the government may not prohibit the free exercise of religion. U.S. Const. amend. I. Consequently, courts have held that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

That is precisely the case here. As others have detailed, the ACA itself already provides for numerous secular exemptions from the HHA Mandate mandate—*e.g.*, grandfathered plans, small businesses—while refusing to similarly exempt employers whose sincere religious beliefs are violated by conforming to the HHS Mandate. *See, e.g.,* Brief of Petitioners, at 43-48, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S.).

That is the very definition of selective application—not neutrality or general applicability.

See, e.g., Church of the Lukumi Babalu Aye, 508 U.S. at 537 ("in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason" (quotations and citation omitted)).

III. The HHS Mandate Is Subject To Strict Scrutiny Under RFRA Because It Creates A Substantial Burden On Religious Exercise.

RFRA ensures that courts apply strict scrutiny to laws that substantially burden religion, no matter what the intention behind those laws. After all, "laws 'neutral' towards religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Thus, even if this burden on religious liberty was an unintended consequence of the HHS Mandate, the Administration is required to come forward with a compelling interest justifying their actions. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403 (1962).

And make no mistake: the burden placed on the religious exercise of employers is substantial. The HHS mandate forces employers to ignore central tenets of their faith—refraining from facilitating or paying for health care coverage that includes certain contraceptive items—or face staggering penalties. That is a textbook substantial burden. *See, e.g.*, *id.* at 404; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). *See also* Brief of Petitioners, at 32-43, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S.) (detailing the substantial burden the HHS mandate imposes on the religious exercise of employers).

Indeed, the monetary penalty for exercising one's religious convictions and refusing to pay for insurance that offers contraceptive coverage "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert*, 374 U.S. at 404.

IV. The Administration Cannot Satisfy Strict Scrutiny Because The HHS Mandate Fails To Serve A Compelling Interest, And Is Not Narrowly Tailored To Serve The Interest Claimed By The Administration.

Strict scrutiny is, without a doubt, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). After all, the rule commands that a law "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (1993).

It is no surprise, then, that the government cannot meet this burden. Not only does the contraception mandate fail to serve a *compelling* interest, it does not even serve the interests that the government proffers in its defense, nor is it narrowly tailored to do so. *See* Brief of Petitioners, *Conestoga Wood Specialties Corp. v. Sebelius*, at 48-66, No. 13-356 (U.S.)

* * *

This Administration has chosen to enforce a mandate that serves no compelling purpose, but nonetheless forces countless individuals and institutions to choose between violating their sincerely held religious beliefs or face draconian

sanctions. That is plainly a violation of the First Amendment and RFRA.

CONCLUSION

The decision of the U.S. Court of Appeals for the Third Circuit should be reversed and the decision of the U.S. Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

DANIEL H. BRANCH
Counsel of Record
3953 Maple Avenue,
Suite 100
Dallas, TX 75219
dbranch@winstead.com
(214) 745-5888

DATED: JANUARY 27, 2014