Nos. 13-354 & 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP. ET AL.,
Petitioners
v.
KATHLEEN SEBELIUS ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF DEMOCRATS FOR LIFE OF AMERICA AND BART STUPAK AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI*[1]

Former Congressman **Bart Stupak** (D-Michigan) served as an active member of the Congressional Pro-Life Caucus throughout his 18 year career (1993-2011), including his last six years as Co-Chair. The Pro-Life Caucus is composed of both Republican and Democratic members of the U.S. House of Representatives. The principal tenet of Caucus members is their belief that the fertilized embryo is a human life and that any man-made disturbance of the embryo is a form of abortion.

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. We believe that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate our opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. As pro-life Democrats, we share the party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of

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[1] No counsel for a 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 the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Blanket letters of consent from the *Conestoga* petitioners and the United States to the filing of *amicus* briefs are on file with the Court. The *Hobby Lobby* respondents consented to the filing of this brief, and such consent has been submitted to the Court.

opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

Both *amici* supported the Affordable Care Act (the ACA or the Act); Stupak was among the pro-life Democratic members of Congress who voted for it. Throughout the process leading to the ACA's passage, *amici* offered means by which it could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion. The House approved a version of the bill with the Stupak-Pitts Amendment, which prohibited the use of federal funds "to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion." Roll No. 884, 155 Cong. Rec. H12962 (Nov. 7, 2009).

As the ACA passed in final form, Rep. Stupak helped negotiate an Executive Order by President Obama reinforcing that under the Act the Hyde Amendment's restriction on federal funding for abortions applied, and that "longstanding Federal laws to protect conscience . . . remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." Executive Order No. 13535, 75 Fed. Reg. 15599, Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act, 2010 WL 1169591 (Mar. 24, 2010). Likewise, Rep. Stupak's colloquy in the final House debate made clear that "current law [on abortion] should apply" under the ACA and that

"the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment." 156 Cong. Rec. H1859, H1860 (Mar. 21, 2010) (statements of Reps. Stupak and Waxman). Thereafter, DFLA defended the Executive Order's validity and identified mechanisms for ensuring that the ACA and the Order would successfully restrict funding for abortion and impositions on conscience.

Amici therefore have a strong interest in ensuring that neither the ACA nor its implementation undermines longstanding conscience rights of individuals and organizations. *Amici* strongly support the ACA's mandate to cover preventive services and its emphasis on health care for women. DFLA's members take varying positions on the mandate's inclusion of contraception among required preventive services. But these *amici* are committed to protecting the conscience rights of individuals and organizations—including those engaged in commerce—with objections to facilitating abortion, including drugs and devices that may act as abortifacients.

SUMMARY OF ARGUMENT

The plaintiffs' motions for preliminary injunctions should be granted in both *Hobby Lobby* and *Conestoga*. The plaintiffs—family owned, closely held corporations and the individuals who own and operate them—object to providing insurance coverage to employees for drugs and devices that the plaintiffs reasonably fear may terminate a human embryo after fertilization.

Plaintiffs' objections fall within our nation's tradition of broadly protecting conscientious objections to facilitating abortions.

I. Multiple federal and state laws show that the nation's tradition of protecting conscience, including religious conscience, is at its strongest and broadest for individuals and organizations that object to facilitating abortions. These protections are relevant in several ways to plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA").

First, and generally, conscientious objections to abortion carry especially strong weight in American law because they fall within our tradition of protecting objectors from participating in actions that the objectors believe unjustly take human life—actions that include assisted suicide, abortion, capital punishment, and war. For this reason, although health-care conscience laws cover religious and moral objections to several procedures, protections for conscientious objection to abortion are particularly strong.

More specifically, laws protecting conscience rights for those objecting to abortion are not limited to individuals or to non-profit or religious organizations. Instead, the right not to facilitate or support abortions typically protects a wide range of objectors, regularly extending to individuals engaged in for-profit commerce and to for-profit businesses.

Finally, our tradition protects objectors to abortion far beyond the case of direct involvement in the performance of the abortion. This reflects the recognition that is the conscience of the objector

that must be protected and it is not for the government to decide what degree of involvement should trigger moral culpability in the objector's mind.

II. Although the government has made statements that terminating a fertilized embryo before it implants in the uterus is not an abortion, the relevant matter for the claim of conscience under RFRA and the First Amendment's Free Exercise Clause is *plaintiffs' belief* that a distinct human life begins at fertilization. It is no salve to plaintiffs' conscience to be told that the government defines abortion differently. Furthermore, plaintiffs have a colorable cause for concern that the drugs and devices to which they object may act to terminate embryos. And even applying the government's definition, there is evidence that the "emergency contraceptive" Ella may terminate embryos after implantation.

III. The longstanding tradition of broadly accommodating conscientious objections to facilitating abortions supports plaintiffs' claims under RFRA. The pattern of conscience protection for objectors to abortion demonstrates that the contraception mandate "substantially burdens" plaintiffs' religious exercise, triggering the government's duty under RFRA to demonstrate that this burden serves a "compelling governmental interest" and does so by the "least restrictive means." 42 U.S.C. § 2000bb-1(a), (b).

The mandate pressures plaintiffs, on pain of substantial liability, to provide insurance coverage for procedures they believe are grave moral evils. The government's attempts to deny this burden

must be rejected. The government claims that for-profit corporations cannot engage in religious exercise. *Hobby Lobby* U.S. Br. 15-22. It also claims that an employer suffers only an insubstantial, "attenuated" burden from being forced to cover methods and procedures that employees choose for themselves. *Id.* at 32, 33-34.

Both of these assertions are irreconcilable with our tradition of protecting health-care-related conscience in the commercial sphere—in particular the strong tradition, under federal and state laws, of protecting objections to abortion. Protections for objections to facilitating abortion have extended to multiple categories of for-profit entities and individuals engaged in commerce, and to many kinds of indirect facilitation, including mandatory coverage of abortion in insurance plans. When impositions are repeatedly prohibited under various conscience provisions, they cannot be dismissed as "insubstantial" burdens under RFRA. Therefore, this Court should find that the mandate substantially burdens plaintiffs by requiring them to cover methods they fear may act to terminate an embryo after fertilization.

Finally, plaintiffs are likely to succeed on the merits of their RFRA claims, because the government has articulated no arguments that would demonstrate a compelling interest in requiring coverage of such methods. The strong tradition of exempting objections to abortion—among other factors—undercuts the government's claim that it has a compelling interest in requiring coverage of possible abortifacients.

ARGUMENT

I. THIS CASE IMPLICATES OUR NATION'S STRONG TRADITION OF BROADLY ACCOMMODATING OBJECTIONS TO FACILITATING ABORTION, INCLUDING OBJECTIONS BY ORGANIZATIONS AND INDIVIDUALS IN FOR-PROFIT SETTINGS.

A. Numerous Laws, Including the Affordable Care Act Itself, Reflect the Nation's Tradition of Accommodating Conscientious Objections to Facilitating Abortions.

Our nation's tradition of protecting conscience is strongest, and broadest, for those who object to supporting abortions. Many federal and state laws protect such objections, including several provisions that the plaintiffs have invoked in their complaints. See *Hobby Lobby* J.A. 163-65 (Compl. ¶¶209-13, 219-23); *Conestoga* Am. Compl. ¶¶144-46. The Hyde-Weldon Amendment, included each year since 2005 in continuing appropriations acts, prohibits federal funds for the HHS and Labor departments from being "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for abortions." Consolidated Appropriations Act, 2012, § 507(d)(1), Pub. L. No. 112-74, 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011) (emphasis added). The protected entities include "health

insurance plan[s]," as well as other commercial entities, including "a hospital, a provider-sponsored organization, [or] a health maintenance organization." *Id.* § 507(d)(2).

Second, the Affordable Care Act itself protects qualified health plans from being forced to cover abortion. The Act states that "nothing in this title [which includes the section concerning "preventive services"] shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i). The Act has other abortion-conscience protections. It restates the Hyde-Weldon principle that "[n]o individual health care provider or health care facility," including commercial entities, may be discriminated against because of a religiously or morally based refusal "to provide, pay for, provide coverage of, or refer for abortions." 42 U.S.C. § 18023(b)(4). And it expressly states that "[n]othing in [t]he Act shall be construed to have any effect" on federal laws concerning "(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2)(A).

President Obama summarized these provisions in his March 2010 Executive Order, which *amicus* Stupak helped negotiate:

> Under the [ACA], longstanding Federal laws to protect conscience (such as the Church Amendment and

> the Weldon Amendment) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.

Executive Order No. 13535, 75 Fed. Reg. 15599, 2010 WL 1169591 (Mar. 24, 2010) (citations omitted).

These provisions of the ACA and the Hyde-Weldon Amendment may prohibit the HHS mandate insofar as it requires plaintiffs to cover drugs and devices that may cause abortions. But these provisions are also highly relevant to the issues before this Court concerning RFRA. The ACA and Hyde-Weldon provisions offer just two examples of the nation's tradition of broad protection for objections to facilitating abortion. As we discuss *infra*, this Court should take that tradition into account in interpreting RFRA.

Protections for objectors to abortion pre-date *Roe v. Wade*, 410 U.S. 113 (1973): states that liberalized their abortion laws before *Roe* "included explicit conscience protections for individuals and institutions in the [liberalization] statutes" or in separate laws. Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions:* Roe*,* Casey*, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame L. Rev. 1, 30-31 & n.142 (2011). Moreover, in announcing constitutional abortion rights in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), this Court simultaneously endorsed conscience protections.

Doe, for example, noted that the Georgia statute in question had provisions "to afford appropriate protection to the individual and to the denominational hospital": for example, "the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee." 410 U.S. at 197-98.

Soon after *Roe*, Congress passed the Church Amendment of 1973, which protects federally funded entities and their personnel from having to perform or provide facilities for abortions or sterilization against their "religious beliefs or moral convictions." Health Programs Extension Act of 1973, § 401, Pub. L. No. 93-45, 87 Stat. 91, 95 (1973), codified at 42 U.S.C. § 300a-7. The Church Amendment also protects individual health-care personnel against discrimination by their employers for such refusals. *Id.* Similar conscience clauses have been enacted in other federal laws and, as of 2007, in 47 states. James T. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007). A number of those states have covered objections concerning other procedures besides abortion. See *id.* at 271 (14 states protect health-care provider conscience concerning contraception, 18 concerning sterilization, and 3 concerning all health procedures). But every one of the 47 states protects provider conscience concerning abortion, and the abortion provisions "are remarkable" in, among other things, "the range of persons covered." *Id.*

Federal law also protects, for example, federally funded entities from any sex-discrimination challenge for refusing "to provide or pay for any

service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. It protects "any health care entity," including an individual, from discrimination by federal or state governments for refusing to provide training, to undergo training, or even to refer someone for training, in performing abortions. 42 U.S.C. § 238n(a), 238n(c)(2). It prohibits the use of legal aid funds to assist any proceeding or litigation that seeks "to compel any individual or institution" to perform, assist with, or provide facilities for an abortion in violation of religious or moral convictions. 42 U.S.C. § 2996f(b)(8). And it protects various health plans and providers from having to cover counseling or referral concerning a service if they object to the provision of such service on moral, ethical, or religious grounds. 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); 48 C.F.R. § 1609.7001(c)(7).

B. Our Laws Give Especially Broad Protection for Conscientious Objections to Facilitating Abortions.

Several conclusions follow from this array of federal and state conscience protections. As a general matter, although protections for objections to a number of health-care procedures are well established in American law, conscientious objections to abortion carry especially strong weight. See Rienzi, 87 Notre Dame L. Rev. at 35 ("The unique history of abortion-related conscience protections shows a collective judgment, arguably over the entire history of the nation, that healthcare providers should not be forced by the government to participate in abortions against their will."). These provisions reflect a more

general principle: the seriousness of the burden on conscience when the objector is forced to participate in taking a life. The "right to refuse to take a human life over a sincere religious or moral objection" has "been consistently protected for health care practitioners in the context of abortion, abortifacient drugs, assisted suicide, and capital punishment," as well as for "conscientious objectors to military service." *Stormans v. Selecky*, 844 F. Supp. 1172, 1183 (W.D. Wash. 2012); see Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 147-48 (2012) ("government efforts to ensure that unwilling individuals are not forced to engage in what they believe to be killings" have been "systematic and all encompassing"). The special breadth of abortion-conscience protection is relevant to this case in two specific ways.

1. Laws protecting conscience rights regarding abortion extend to for-profit businesses, not just individuals and non-profit organizations.

The right not to facilitate or support abortions regularly extends to individuals engaged in for-profit commerce, and to for-profit corporations. Both the Affordable Care Act and the Hyde-Weldon Amendment protect not only health insurance plans—directly covering this case—but other commercial entities such as hospitals, HMOs, and provider-sponsored organizations. See *supra* pp. 7-9. All of the relevant provisions, from the Church Amendment through state conscience clauses to Hyde-Weldon and the ACA, protect individuals engaged in commerce—health-care personnel of

various kinds—from having to participate in abortions.

2. Laws protecting conscience rights regarding abortion extend far beyond direct involvement in performing abortions.

Our tradition protects objectors to abortion far beyond the case of direct involvement in the performance of the abortion. Health-insurance plans are exempt, under the Hyde-Weldon Amendment and the ACA, from having to facilitate abortions through the provision of coverage. Entities and individuals are protected not only from having to participate in the abortion, but from having to refer anyone for an abortion, or for abortion training, or from having to assist in other ways. See statutes cited *supra* pp. 7-9, 11; Rienzi, 87 Notre Dame L. Rev. at 34 ("[t]hese protections extended not only to direct personal performance of an abortion, but more broadly to providers who have an objection to being forced to 'participate,' 'refer,' 'assist,'" or facilitate in other ways concerning abortion).

As discussed more fully in part III, the broad range of objectors and actions that these protections cover indicate society's recognition of the seriousness of the burden on the objector who believes abortion takes a life. The protections indicate powerfully that for purposes of RFRA, mandating coverage of abortifacients imposes a "substantial burden," even on for-profit entities, and does not serve a "compelling governmental interest."

II. PLAINTIFFS FALL WITHIN THE TRADITION OF ESPECIALLY STRONG PROTECTION FOR ABORTION OBJECTORS BECAUSE PLAINTIFFS HAVE A COLORABLE BASIS FOR FEARING THAT THE DEVICES AND DRUGS AT ISSUE MAY CAUSE TERMINATION OF A NEWLY-FERTILIZED EMBRYO.

This case implicates the tradition of protecting conscientious objections to abortion, in that plaintiffs object to devices and drugs that may act to terminate a newly fertilized embryo.

As the *en banc* Court of Appeals for the Tenth Circuit explained, respondents Hobby Lobby Stores Inc., Mardel Inc., and their owners, David and Barbara Green and their children, Steve Green, Mart Green and Darsee Lett, believe that human life begins when a sperm fertilizes an egg. Pet. App. 7a-8a. As a result, they believe it is immoral to facilitate any act that causes the death of a human embryo. *Id.* Accordingly, they object to "providing coverage for any FDA-approved device that would prevent implantation of a fertilized egg," and they would be violating their beliefs if the health plans offered by Hobby Lobby and Mardel provided coverage or paid for the four FDA-approved contraceptive methods that may prevent uterine implantation: Ella, Plan B, and two intrauterine devices (IUDs). Pet. App. 14a; see also *Hobby Lobby* J.A. 139 (Compl. ¶53). The Greens have no religious objection to providing coverage for the other contraceptives covered by the HHS mandate, which do not cause abortions. *Hobby Lobby* J.A. 140 (Am. Compl. ¶57).

The Greens' adherence to their religious tenets in the provision of health insurance unquestionably coincides with their general commitment to allow their faith to guide their business decisions—summarized in the Hobby Lobby statement of purpose, "Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." Pet. App. 8a. For example, Hobby Lobby's and Mardel's stores are closed on Sundays; Mardel's stores sell Christian books and materials; and Hobby Lobby has buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *Id.*

As the court of appeals found, the mandate puts the Greens and their companies to a "Hobson's choice": they must either (1) violate their faith by providing and paying for potential abortifacients, (2) pay approximately $475 million in fines yearly if they omit the objectionable devices from their health plans, or (3) pay $26 million yearly and suffer a substantial competitive disadvantage in recruiting and caring for their employees if they drop health insurance altogether. Pet. App. 52a.

Similarly, petitioners Conestoga Wood Specialties Corporation and the Hahns, owners and operators of the business, "object to facilitating" the use of contraceptives and IUDs that may "prevent the uterine implantation of human embryos." *Conestoga* Pet'rs' Br. 4. "The Hahns' Mennonite Christian faith requires them to integrate the gifts of the spiritual life, including its moral and social principles, into their life and work; they cannot separate their religious beliefs from their business practices." *Id.* at 5. Because

"[t]he Mennonite Church teaches that taking a life is an intrinsic evil and sin against God for which all are held accountable, . . . the Hahns believe that it would be immoral for them to facilitate, or otherwise support the taking of a human life through war, capital punishment, suicide, euthanasia, or abortion." *Id.* at 3-4. And because the Hahns believe that "'human life begins at conception'" (*id.* at 5 (quoting Hahn Family Statement on the Sanctity of Human Life)), they view the intentional termination of an embryo, at any time after fertilization, as an impermissible abortion, which destroys a sacred life and is tantamount to murder. See *id.*

As a result, the Hahns "believe that it would be immoral for them to" pay for, or contribute in any way to, the use of abortifacient contraception, which they define as any drug or device that "prevent[s] the implantation of a human embryo into its mother's uterus after its fertilization." *Id.* at 4. The mandate puts the Hahns and Conestoga to the choice of violating their religious tenets by paying for possible abortifacients; paying $35 million yearly in fines for excluding the abortifacients from their health plans; or dropping health insurance altogether, which would require them to pay $1.9 million yearly and also "would have violated Petitioners' religious principles, devastated their work force, and compromised Conestoga's competitive position in the marketplace." *Conestoga* Pet. Cert. 7-8.

Plaintiffs here can invoke the strong tradition of abortion-conscience protection notwithstanding statements by the government that the drugs and devices in question are not abortifacients because

the latest point at which they operate is to prevent implantation of a newly fertilized embryo in the uterus. See, e.g., *Hobby Lobby* U.S. Br. 9-10 n.4; Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771. This assertion by the government is both irrelevant to a claim under RFRA and wrong on its merits.

A. Under RFRA, It Is the Plaintiffs' Definition of Abortion, Not the Government's, That Is Relevant to This Case.

The fundamental issue in a case involving RFRA is the *objector's belief*. As this Court has stated, "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). The rule applies *a fortiori* where, as here, the government imposes substantial monetary liability. The Greens and Hahns, like millions of other Americans, believe that the life of a distinct human person begins at fertilization and that the grave wrong of abortion includes intentionally preventing the embryo's implantation. The government, of course, cannot question the validity of that moral view. See *Thomas*, 450 U.S. at 714 (under Free Exercise Clause, whether a law conflicts with a claimant's religious belief "is not to

turn upon a judicial perception of the particular belief or practice in question").

Since these objectors believe that a distinct life begins at conception, it is no salve to their conscience to be told that the government defines abortion differently. Whatever the definition in the government's statements, objectors like plaintiffs are suffering the particularly serious burden of being forced to facilitate acts that they believe take an innocent human life. This nation's tradition of broadly protecting abortion objections must extend to them and to their claims under RFRA.

Plaintiffs' beliefs also include a factual component: that the four drugs and devices pose a risk of terminating a new embryo, a risk in turn sufficiently great that it is immoral to facilitate their use. This judgment too must receive deference from a court. Objectors such as plaintiffs weigh the risk in the light of the seriousness with which they view the intentional termination of embryonic life. This element is common in religious and moral analyses of "cooperation with evil." For example, Catholic moral teaching emphasizes that "'it is important to recognize just how serious abortion is when considering whether there are proportionate (i.e., very serious) reasons'" that warrant calling an action "remote" (that is, permissible) cooperation with abortion rather than "proximate" (impermissible) cooperation. Paul Loverde and Francis DiLorenzo, *The Voter's Responsibility*, 35 Origins CNS Documentary Service 370, 371 (2005) (statement of Catholic bishops of Virginia) (quoted in Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. Cath. Leg. Stud. 211,

237 (2007)). Likewise, a pacifist forced to serve in a military unit is substantially burdened even if the likelihood that he or she will kill someone is relatively low; and a person forced to fire a loaded gun at another individual is substantially burdened even if most of the chambers are blanks.

Deference to the religious objector's judgment about (among other things) the gravity of the wrong requires that the court give the objector great leeway in determining what risk of the harm's occurrence is morally unacceptable. When it is colorable to believe that a drug or device may operate after fertilization, the objector's claim should fall within our tradition of broad protection for objections to abortion.

B. Objectors Have a Colorable Basis for Fearing that the Drugs and Devices in Question May Cause Termination of Embryos.

A colorable basis for fearing embryo-terminating effects exists for both the emergency contraceptive drugs and the IUDs in question. With respect to the former, the labeling information on both Ella (ulipristal acetate) and Plan B (levonorgestrel) states that although the primary mechanism for preventing pregnancy is inhibition or delay of ovulation, "[a]lterations to the endometrium that may affect implantation may also contribute to efficacy." *Ella* Full Prescribing Information, 12.1 (Aug. 2010), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; see also Plan B One-Step Prescribing Information, 12.1 (rev. July 2009), available at

http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (stating that Plan B is believed to act principally by preventing ovulation or fertilization; "[i]n addition, it may inhibit implantation (by altering the endometrium)").[2] Making the endometrium, the uterine lining, unreceptive to implantation is one way to cause the abortion of a new embryo. Based on these statements, an organization or individual convinced that a distinct human life begins at fertilization has a reasonable basis for objecting that the medicines they are being forced to cover can act as abortifacients. On a matter as grave as the risk of terminating human life, the objector is entitled to take seriously the government's statements that the risk exists.

With respect to Ella (ulipristal) in particular, objectors clearly have ample reason to conclude that the medication may terminate an embryo. Ulipristal is a selective progesterone receptor modulator (SPRM); as such it is structurally similar and "has similar biological effects to mifepristone, the antiprogestin used in medical

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[2] As already noted, Secretary Sebelius herself has admitted that FDA-approved emergency contraceptives are "a category [of drugs] that prevent fertilization and implantation." Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771.

abortion."[3] Although Ella involves lower doses of mifepristone than does RU-486, the so-called abortion pill, the record of the FDA's approval for Ella contains multiple statements that when administered after ovulation, the drug affects the endometrium in a way that could prevent implantation of a fertilized embryo. For example, the background document for the FDA advisory committee on Ella states that "[a]dministration of ulipristal in the luteal phase [of the menstrual cycle] also alters the endometrium. Based on the findings of the pharmacodynamic studies, ulipristal appears to exert an anti-progesterone contraceptive effect on both the ovary and endometrium, depending on the dose and time of drug administration during the menstrual cycle."[4]

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[3] Giuseppe Bernagiano & Helena von Hertzen, *Towards More Effective Emergency Contraception?*, 375 The Lancet 527, 527 (Feb. 13, 2010).

[4] See FDA, Background Document for Meeting of Advisory Committee for Reproductive Health Drugs, FDA Advisory Committee Materials, NDA 22-474 (Ella), at 11-12 (June 17, 2010), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM215425.pdf (hereinafter FDA Background Document). See also FDA, Transcript of Proceedings, Advisory Committee on Reproductive Health Drugs 121 (June 17, 2010) (Dr. Ronald Orleans, FDA Medical Officer) ("Another possible mode of action is delaying the normal endometrial maturation which occurs in the luteal phase of the cycle. This delay of maturation could possibly prevent implantation."), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealth

As one member of the FDA's advisory committee stated: "I'll even concede that the primary mechanism of action might be delayed ovulation, but not in this group that's five days out from unprotected intercourse. . . . I can't imagine how we can put all of these numbers together to say that delayed ovulation explains this continued efficacy [at five days after intercourse]."[5]

There is also evidence that Ella may have effects post-implantation, a time period that satisfies even the government's asserted definition of abortion. The FDA's own materials cite studies in pregnant rats and rabbits in which ulipristal "at drug exposures comparable to human exposure based on surface area (mg/m2)" were lethal to embryos.[6] Similarly, the European Medicines Agency (EMEA), the EU equivalent of the FDA, found embryotoxic effects in rats, rabbits, guinea pigs, and macaques (similar to monkeys). See European Medicines Agency, "CHMP Assessment Report for EllaOne," (Doc.Ref.: EMEA/261787/2009), at 16, 10 (finding that *ella* "is embryotoxic at low doses, when given to rats and rabbits" and "[was] approximately equipotent at the dose levels of 10 and 30 mg/day in terminating pregnancies in guinea-pigs"), available at http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Public_assessment_report/human/001027/WC500023673.pdf. These studies may not have

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DrugsAdvisoryCommittee/UCM218560.pdf (hereinafter Advisory Committee Proceedings).

[5] Advisory Committee Proceedings, *supra* note 4, at 160, 164 (statement of Dr. Scott Emerson).

[6] FDA Background Document, *supra* note 4, at 10.

conclusively determined the drug's effect on fetal development after implantation,[7] but they unquestionably raise significant concerns for the objector who believes that the genetically distinct human life that begins at fertilization must be protected.

With respect to Plan B, although some scientific studies have concluded that it does no more than prevent conception,[8] other studies, as well as the government's own labeling and statements, indicate that it may act after fertilization. For example, a summary of various effectiveness studies for levonorgestrel concludes that there are significant discrepancies between the effectiveness reported and the effectiveness that can be attributed to the drug's disturbance of ovulation. The authors conclude that "[e]ither the actual clinical effectiveness is far lower than has been estimated in the literature to date" or "that mechanisms of action other than disturbance of ovulation contribute to the reduction of clinical pregnancy, including mechanisms acting after fertilization."[9] Given such uncertainties, together

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[7] *Id.* at 10-11.

[8] See, e.g., Sandra E. Reznik, *'Plan B': How It Works*, Health Progress, Jan.-Feb. 2010, at 59, available at http://www.chausa.org/docs/default-source/health-progress/hp1001k-pdf.pdf?sfvrsn=0. These arguments concerning the mechanism of action of levonorgestrel do not apply to ulipristal, which "is a new chemical entity, has a different mechanism of action, and a more limited safety profile." Advisory Committee Proceedings, *supra* note 4, at 222-23 (statement of Dr. Carol Ben-Maimon).

[9] Rafael T. Mikolajczyk and Joseph B. Stanford, *Levonorgestrel: Emergency Contraception: a Joint*

with the medication's labeling and the government's other statements, objectors have a colorable basis for believing that Plan B may affect implantation.

With respect to the two IUDs in question, the FDA prescribing information likewise states that they have the potential to operate by altering the uterine lining and preventing implantation. See, e.g., *Proposed Prescribing Information, ParaGard T 380A Intrauterine Copper Contraceptive*, at 3, http://www.accessdata.fda.gov/drugsatfda_docs/label/2005/018680s060lbl.pdf (possible "prevention of implantation"); *Mirena (Levonorgestrel-Releasing Intrauterine System)*, at 3, http://www.accessdata.fda.gov/drugsatfda_docs/label/2008/021225s019lbl.pdf (possible "alteration of endometrium"); FDA, *Birth Control: Medicines To Help You*, available at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last visited Jan. 22, 2014) (stating that certain IUDs may "prevent[]" "implant[ation]" of embryos). With respect to the copper IUD, a Princeton-based study concluded that "[i]ts very high effectiveness implies that emergency insertion of a copper IUD must be able to prevent pregnancy after fertilization."[10] And the Family Planning Council, in a fact sheet on IUDs, says, "An IUD also changes the lining of

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Analysis of Effectiveness and Mechanism of Action, 88 Fertility and Sterility 565, 569, 570 (Sept. 2007).

[10] James Trussell, Ph.D., Elizabeth G. Raymond, MD, MPH & Kelly Cleland, MPA, MPH, *Emergency Contraception: A Last Chance to Prevent Pregnancy*, Princeton U., at 7 (Dec. 2013, http://ec.princeton.edu/questions/ec-review.pdf.

the uterus so an egg does not implant in the lining if it has been fertilized. Therefore, the egg has no place to grow."[11] The non-copper IUD (brand name *Mirena*) releases varying amounts of levonorgestrel, which, according to the manufacturer's materials, may not only inhibit sperm from reaching and fertilizing the egg but may also thin the endometrial uterine lining (which, again, would inhibit implantation).[12]

In short, the colorable fears that plaintiffs have that Ella, Plan B, and the two IUDs may terminate a new embryo are sufficient to bring this case within the tradition of making especially broad accommodation for conscientious objections to facilitating abortions.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM.

RFRA provides that the federal government "shall not substantially burden a person's exercise

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[11] Family Planning Council, *Facts About IUDs*, at 1, http://www.familyplanning.org/pdf/Facts_About_IUDs.pdf (last visited Jan. 22, 2014). See also Mikaela Conley, *IUDs Work Best for Emergency Contraceptive*, ABC News, May 9, 2012, http://abcnews.go.com/Health/iuds-work-best-emergency-contraceptive/story?id=16305031 ("'The one thing that is different from the morning-after [pill], is the way it works. . . . [T]he IUD prevents implantation. That means the egg is fertilized. That brings up issues.'") (quoting gynecologist Dr. Jacques Moritz).

[12] *How Does Mirena Work?*, available at http://www.mirena-us.com/about-mirena/how-mirena-works.php (last visited Jan. 22, 2014).

of religion even if the burden results from a rule of general applicability," unless the government demonstrates that imposing that burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

The federal contraception mandate is unquestionably subject to RFRA. By the statute's terms Congress provided that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter [i.e. RFRA] unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). RFRA thus "bolsters the already robust presumption against implied repeal by stating that any repeal or override of its protections must be explicit." Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 Notre Dame L. Rev. 2179, 2181 (2012); see, e.g., *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (noting the "'well settled'" rule disfavoring repeals by implication) (quotations omitted). The Affordable Act includes no provision—let alone any explicit language—excluding RFRA's application to the ACA or to regulations (such as the contraceptive mandate) based on the ACA.

On the merits, plaintiffs' claims under RFRA find strong support in the widespread pattern we have detailed of federal and state-law protections for objections to facilitating abortions (see *supra* pp. 7-13). RFRA's key terms—"exercise of religion," "substantial burden," and "compelling governmental interest"—reflect Congress's general value judgment to accommodate, where possible,

the constitutional interest in free exercise of religion. To fill in the meaning of such terms, as in other areas of interpretation, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (looking to such evidence in Eighth Amendment cases). The pattern of conscience protections provides strong objective evidence that mandating coverage of potential abortifacients imposes a "substantial burden" on an objector, including a for-profit closely held corporation and its individual owners. And the fact that the protections are so numerous indicates that there is not a compelling interest, generally, in forcing objectors to facilitate abortions.

A. The Mandate Imposes a Substantial Burden on Plaintiffs' Religious Exercise.

We agree with the plaintiffs that both the individual owners and their closely held corporations are engaged in "religious exercise" when the individuals seek to run the businesses according to the principles of their faith. *Conestoga* Pet'rs' Br. 17-32; *Hobby Lobby* Pet. App. 23a-32a (*Hobby Lobby* court of appeals opinion). We also agree with the plaintiffs that the government substantially burdens their religious exercise when it requires them to support potential abortifacients, which they regard as sinful, by including them in their insurance plan and paying premiums to cover them. *Conestoga* Pet'rs' Br. 38-43; *Hobby Lobby* Pet. App. 44a-56a. Accordingly, plaintiffs' claims trigger RFRA, and the

government must show a compelling interest in imposing these burdens.

The government's arguments that compelling-interest test is not triggered here are erroneous for a number of reasons. We focus on the right of conscientious objection against abortion and the logical effect that the government's arguments would have on that right. The government's narrow conception of religious exercise and "substantial burden" is irreconcilable with the nation's particularly strong tradition of protecting objections to abortion by both organizations and individuals.

1. We turn first to the government's argument that a for-profit corporation cannot be a person "exercising religion" under RFRA. See *Hobby Lobby* U.S. Br. 15-22; *Conestoga Wood Specialties v. Sec'y of U.S. Dept. of Health & Human Services*, 724 F.3d 377, 382-89 (3d Cir. 2013) (accepting the argument). We agree with plaintiffs' response: RFRA's protections are not limited to "religious organizations" (e.g., *Conestoga* Pet'rs' Br. at 24-28), and the corporations that individuals form and operate can exercise religion in the for-profit corporate setting.

The restrictive understanding of religious exercise is wrong for another reason. It would mean that, so far as RFRA (and free-exercise principles in general) are concerned, an employer could be forced to cover the cost of abortion itself. This is irreconcilable with the strong pattern of accommodations in federal and state law for those objecting to participating in abortions—including the objections of commercial entities such as

businesses and health insurers. See *supra* pp. 7-13. Over and over again, federal and state laws have recognized that entities as well as individuals engaging in commerce exercise their religious conscience in objecting to facilitating abortions and other procedures and should be protected. It makes no sense to say that an interest recognized so frequently does not constitute the "exercise of religion" under RFRA.

In fact, as one state court has recognized, what health-care conscience laws do, "by offering protections to those who seek not to act in the health-care setting due to religious convictions," is precisely to "bolste[r]" "'a person's exercise of religion.'" *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (using state health-care conscience act to protect corporate owners of pharmacies, as well as individual pharmacists, from state rules requiring them to provide emergency contraception), appeal dismissed, 982 N.E.2d 770, 367 Ill. Dec. 620 (Ill. 2013) (Table, No. 115122). The court held that the purposes of Illinois's conscience act—which covers corporate owners—are harmonious with the state's own version of RFRA. This Court should hold the same for the federal RFRA: its purposes harmonize with the many federal and state conscience acts protecting objections to facilitating abortion.

2. Next we turn to the government's argument that the plaintiffs' religious exercise is not "substantially burdened" under RFRA because they are not being forced to do anything directly sinful themselves. The government claims that

> RFRA does not protect against the burden on religious exercise that "arises when one's money circuitously flows to support the conduct of other free exercise-wielding individuals who hold religious beliefs that differ from one's own."

Hobby Lobby U.S. Br. 34 (quoting *O'Brien v. United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), appeal docketed, no. 12-3357 (8th Cir. argued Oct. 24, 2013)).

As plaintiffs point out, however, this ignores that they believe it is wrong for them to facilitate the wrongs of others. Pet'rs' Br. at 4, 34-37. Again, the government's argument conflicts with *Thomas v. Review Board*, 450 U.S. 707, where the claimant quit his job because, based on his religious beliefs, he was unwilling to work in a factory that produced tank turrets. The state denied him unemployment benefits and argued that his objection was unfounded because he had been willing to work in a different factory that produced materials that might be used for tanks. The Supreme Court held that in determining whether Thomas's religious beliefs were burdened, it could not second-guess his judgment about what connection to armament production was unacceptably close for him: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

Plaintiffs are entitled, just as much as Mr. Thomas was, to make judgments about when their connection comes too close to action they believe is

immoral—in the case of abortion, the grave immoral action of taking an innocent human life.

Under the logic of the government's argument, there is no burden on *any* employer that is forced to provide insurance coverage for employees' abortions. There would be no burden even on a religious organization, even on a Catholic diocese. But HHS's own exemption and accommodation for religious organizations show that it recognizes that an organization is significantly burdened by having to provide its employees insurance coverage to fund procedures it regards as sinful. See *Conestoga* Pet'rs' Br. 33-34.

Once again, the government's position here is irreconcilable with the long tradition of protecting conscientious objectors to abortion, which extends well beyond cases of direct personal involvement in the abortion. In multiple ways and contexts, federal and state laws protect those who refuse to help others procure or perform abortions. Objectors are freed from having to refer someone to an abortion provider, from having to provide facilities, and from having to conduct training sessions or refer someone for training sessions—even though in all those cases it could be said that the objector was merely facilitating someone else's voluntary participation. See *supra* p. 13. And most relevantly, both the ACA and the Hyde-Weldon Amendment specifically protect health plans (and by extension, employers purchasing them) from having to cover abortions. Burdens that over and over again trigger protections in federal and state laws cannot be dismissed "insubstantial" under RFRA.

In short, to find no substantial burden here would mean that government could force a small or closely held business to fund any abortion whatsoever, with no barrier from RFRA or free-exercise principles. Again, that would be irreconcilable with the nation's tradition of broad conscience protection for objectors to abortion, including individuals and entities in the for-profit sphere.

B. The Government Has Not Shown That Requiring Employers to Cover the Drugs and Devices at Issue Serves a Compelling Interest, Or That It Does So by the Least Restrictive Means.

Once the plaintiff demonstrates a substantial burden, the government has the obligation to demonstrate that application of the burden to the plaintiff furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). "[D]emonstrates" means that the government must "mee[t] the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3).

The government has not met either of those obligations. The government's general claims—that requiring objecting employers to cover contraception is necessary to promoting women's health and equity—cannot suffice to overcome claims of conscience concerning abortifacients, for a combination of reasons, some relating particularly to abortifacients, others applying more broadly.

By the Secretary's own admission, contraception is widely available in "community health centers, public clinics, and hospitals with income-based support,"[13] and there is no demonstration that these drugs and devices are different. Like contraception in general, emergency contraceptives and IUDs are subject to the huge coverage gaps that the ACA leaves: the exemption of small businesses (under 50 full-time employees) from the underlying requirement to provide health insurance, and the grandfathering of thousands of plans covering tens of millions of employees. See, e.g., *Conestoga* Pet'rs' Br. 44.

In addition, there are particular reasons to doubt that the government's interest is compelling with respect to potential abortifacients. First, the nation's tradition of broadly accommodating conscientious objections to facilitating abortion makes it extremely unlikely that the government can show a compelling interest in overriding employers' conscience concerning embryo-terminating drugs. With respect to abortion, the government accommodates the conscientious scruples of for-profit employers, health-insurance plans, health-care facilities, and individual salaried providers. The government cannot overcome the strong claim of conscience here concerning potential abortifacients by the mere declaration that all FDA-approved contraceptives

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[13] News Release, Dep't of Health and Human Servs., A Statement by [HHS] Secretary Kathleen Sebelius (Jan. 20. 2012), available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

should be covered or that terminating an embryo before implantation is not an abortion.

Second, the government has justified the mandate throughout based on arguments that the costs of contraceptive methods may deter a significant number of women from using them. See, e.g., Final Rules, Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). But even if that argument were valid, there is no specific showing it should also apply to emergency contraceptives. While the proper use of routine contraception should be frequent and regular over months, medicines like Ella and Plan B are appropriate for only a limited range of situations—shortly "after unprotected intercourse or a known or suspected contraceptive failure"—and neither is "intended for routine use as a contraceptive."[14] The costs of regularly ingested contraceptives mount over months; according to one chart, they reach up to $960 a year for uninsured women taking certain pills.[15] Ella

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[14] FDA, Ella Prescribing Information, ## 2, 1, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; FDA, Plan B One-Step Prescribing Information, ## 2, 1, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf.

[15] Center for American Progress, *The High Costs of Birth Control: It's Not Affordable As You Think* (Feb. 15, 2012), available at http://www.americanprogress.org/issues/women/news/2012/02/15/11054/the-high-costs-of-birth-control/.

and Plan B cost roughly $35 to $55 per dose.[16] Thus, it would take multiple uses of Ella or Plan B in a year (up to 20) to equal the yearly cost of routine contraception—a pattern contradicting the direction that neither Ella nor Plan B is "intended for routine use as a contraceptive." In that light, the government cannot simply equate the expenses for emergency and regular contraception without demonstrating the compelling need to require objecting employers to cover the former. Since there is no such demonstration at this point, the preliminary injunction should be granted.

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[16] See, e.g., Andrea Kim and Mary Barna Bridgman, *Ulipristal Acetate (ella)**:** A Selective Progesterone Receptor Modulator For Emergency Contraception***,*** 36 Pharmacy & Therapeutics 325 and Table 1 (June 2011), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3138379.

CONCLUSION

The judgment of the court of appeals in *Hobby Lobby* (No. 13-354) should be affirmed, and the judgment of the court of appeals in *Conestoga* (No. 13-356) reversed, and the preliminary injunction should be granted in each case.

Respectfully submitted.

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