IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	No. 12-6294
	)	
KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

BRIEF OF AMICI CURIAE SENATOR ORRIN G. HATCH, SENATOR DANIEL R. COATS, SENATOR THAD COCHRAN, SENATOR MIKE CRAPO, SENATOR CHARLES GRASSLEY, SENATOR JAMES M. INHOFE, SENATOR MITCH MCCONNELL, SENATOR PAT ROBERTS, SENATOR RICHARD SHELBY, CONGRESSMAN LAMAR SMITH, AND CONGRESSMAN FRANK WOLF

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STATEMENT OF INTEREST

Amici are federal legislators who were part of the broad, bipartisan coalition that enacted the Religious Freedom Restoration Act of 1993 ("RFRA").[1] Amici designed and passed RFRA to establish a blanket default rule that would insulate religious liberty from the shifting fortunes of interest-group politics. Defendants have ordered that certain employers' insurance plans must cover all FDA-approved contraceptives without cost-sharing (the "HHS mandate"), but have refused to exempt many employers with sincere religious objections. Amici have an interest in vindicating RFRA's blanket protections against the selective and stingy approach adopted by Defendants.

SOURCE OF AUTHORITY TO FILE – ALL PARTIES HAVE CONSENTED TO THE FILING OF THIS BRIEF

Pursuant to Fed. R. App. P. Rule 29(a), all Parties have consented to the filing of this brief.[2]

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[1] Amici Curiae are all members of the United States Senate or the United States House of Representatives: Senator Orrin G. Hatch, Senator Daniel R. Coats, Senator Thad Cochran, Senator Mike Crapo, Senator Charles Grassley, Senator James M. Inhofe, Senator Mitch McConnell, Senator Pat Roberts, Senator Richard Shelby, Congressman Lamar Smith, and Congressman Frank Wolf.

[2] Pursuant to Fed. R. App. P. 29(c)(5), Amici state that (A) this brief is authored by counsel for Amici; no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person other than Amici or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Through the Religious Freedom Restoration Act, Congress sought to curb government-imposed infringements on religious liberty by providing that "government shall not substantially burden a person's exercise of religion" unless the government is able to meet one of the most demanding tests known to law. 42 U.S.C. § 2000bb-1(a)-(b). Although the District Court recognized that the term "person" ordinarily encompasses corporations, companies, associations, and individuals, and further recognized that nonprofit corporations qualify for protection under RFRA, the District Court nevertheless created an exemption from RFRA's coverage for what it described as "secular, for-profit corporations" by incorrectly concluding that such corporations "are not 'persons' for purposes of the RFRA." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278, 1291-92 (W.D. Okla. 2012). Congress could have carved out such a category of unprotected "persons" in RFRA itself or in a later statute, but it did not. And this judicially created carve-out is directly contrary to one of the primary reasons Congress enacted RFRA in the first place: to prevent those charged with implementing the law from picking and choosing whose exercise of religion is protected and whose is not.

RFRA is a "super-statute" that cuts across the entire U.S. Code and applies a single, religion-protective principle for evaluating all actions of the federal

government that substantially burden the exercise of religion. Congress can displace RFRA's protection through ordinary legislation; but Congress must do so explicitly, and Congress did not do so in the Patient Protection and Affordable Care Act.

Although bound to formulate the HHS mandate in accordance with RFRA, Defendants ignored RFRA throughout the administrative process and began to attend to its requirements only in response to litigation and the pressures of public opinion. In taking this course, Defendants have not only violated RFRA but have undermined its central purpose of insulating the free exercise of religion from the forces of standard interest-group politics.

Rather than follow RFRA's requirement of a single standard for all, Defendants have erected a three-tiered approach to religious objections rooted in a combination of state policies and political compromise, offering protection to some corporations while leaving others with none. Notwithstanding the District Court's conclusion to the contrary, Defendants' carve-out of a category of "persons" from protection under RFRA is entirely improper under that law. Defendants must satisfy strict scrutiny to justify their threatened imposition of coercive financial penalties on Plaintiffs for their refusal to cover "abortion-causing drugs and devices." Jt. App., at 27a (Complaint, ¶ 56). Because Defendants cannot meet this

heavy burden, the HHS mandate may not be enforced against Plaintiffs and, therefore, Plaintiffs should have been afforded preliminary injunctive relief.

ARGUMENT

I. RFRA Is a Super-Statute that Protects the Free Exercise of Religion from Standard Interest-Group Politics

The Religious Freedom Restoration Act "is the most important congressional action with respect to religion since the First Congress proposed the First Amendment." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994). It was produced by an "extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended . . . the various religious faiths . . . as well as those who champion the cause of civil liberties." *Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 13 (1991) (statement of Rep. Solarz, chief sponsor of H.R. 5377).

This bipartisan legislative coalition came together to provide heightened protection for the free exercise of religion in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4)-(5), § 2000bb(b)(1). *Smith* sent the question of religious exemptions generally back into the political

process. But Congress reacted legislatively by restoring a general principle designed to take free exercise questions out of "the standard interest-group politics that affect our many decisions." *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797).

Congress's intent in passing RFRA can be seen in four concrete ways: (1) the statute's "super-statute" design to cut across other federal laws; (2) the statute's textual declaration of purpose; (3) the statute's across-the-board protection for free exercise of religion; and (4) the statute's provision of a judicial backstop.

RFRA applies "to all Federal law, *and the implementation of that law*, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *See* 42 U.S.C. § 2000bb-3(a) (emphasis added). By virtue of this application to all law formulation and implementation, "RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. . . . [It] is thus a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253-54 (1995). Congress can set aside RFRA's application by ordinary legislation, but Congress must do so explicitly. RFRA provides as a

"[r]ule of construction" that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b).

The text of RFRA declares two statutory purposes. One is to provide heightened, across-the-board protection for the free exercise of religion: "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The other is to provide a judicial forum for the vindication of this legal protection by "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2).

The primary operative section of RFRA sets forth a general rule that provides the same level of protection to all religious groups and to all exercises of religion: "Government shall not substantially burden a person's exercise of religion . . . except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a). This rule applies to all levels of the Federal Government. *See* 42 U.S.C. § 2000bb-2(1) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States").

The single provision defining the exception to RFRA's general rule sets forth a strict two-part test: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . (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(b). In describing what the Government must prove to come within this exception, RFRA defines "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). In sum, RFRA sets forth a single default rule that the Government may not substantially burden a person's exercise of religion, and the *sole* exception is when the Government carries the burden of satisfying strict scrutiny.

The Government cannot satisfy this exception by asserting "broadly formulated interests justifying the general applicability of government mandates." *Gonzales v. O Centro Espirita Beneficent União do Vegetal*, 546 U.S. 418, 431 (2006). Rather, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31, quoting 42 U.S.C. § 2000bb-1(b).

The next subsection of RFRA provides for judicial relief against Government violations. *See* 42 U.S.C. § 2000bb-1(c) ("A person whose religious

exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."). As the statute's findings indicate, this judicial backstop was an essential part of the statutory design. *See* 42 U.S.C. § 2000bb(b)(2).

Congress recognized, as did various witnesses who testified in hearings on RFRA, that Government bureaucrats and agencies tend to discount the need for religion-based exemptions because they identify their own programs with the public interest. *See Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 29 (1991) (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) ("[W]hen every branch of Government and every agency likes to think that it is, by definition, expressing the public interest, and the public interest in its most compelling level, there is need for a neutral referee to judge that claim against the private claims of religious liberty."); *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340-341 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("No government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated.").

II. Defendants Have Ignored and Violated RFRA in Implementing the HHS Mandate

Defendants have known of religion-based objections to the HHS mandate from the beginning of the lengthy administrative process through which they have attempted to implement it. But Defendants ignored RFRA in formulating the narrow religious exemption at the outset and have only begun to attend to its requirements because of litigation and the reaction to public scrutiny. As a consequence, Defendants have erected a three-tiered approach to religious objectors that provides third-class treatment to Plaintiffs at the bottom of Defendants' invented hierarchy and violates RFRA's single religion-protective standard.

A. Defendants Have Ignored RFRA Throughout the Lengthy Administrative Process

Nothing in the Patient Protection and Affordable Care Act explicitly excludes the implementation of the women's preventive health services coverage requirement from the Religious Freedom Restoration Act. RFRA therefore directly controls Defendants' exercise of their rulemaking authority to implement the women's preventive health services coverage requirement. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application by reference to this

chapter."). Yet Defendants ignored RFRA in designing the mandate and began to address its requirements only in response to litigation and public opinion.

In August 2011, Defendants implemented the statutory women's preventive services coverage requirement by imposing the mandate with a narrow "religious employer" exemption. Specifically, the HRSA released guidelines requiring certain group health plans and health insurance issuers to cover all FDA-approved contraceptives for women.[3] Defendants promulgated interim final regulations that authorize the HRSA "to exempt *certain* religious employers from the Guidelines where contraceptive services are concerned." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (emphasis added). But neither the HRSA guidelines nor the Interim Final Rule mentioned or purported to apply the Religious Freedom Restoration Act.

Instead of following RFRA's controlling statutory command that "[g]overnment shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a) — that is, *any* person's exercise of religion — Defendants' "religious employer" exemption addressed only "the unique relationship between a house of worship and its employees in ministerial positions." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). And rather than formulate this

[3] *See* Health Resources and Services Administration, Department of Health and Human Services, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (August 1, 2011), available at http://www.hrsa.gov/womensguidelines.

exemption from the federal contraceptives mandate in accordance with federal law (*i.e.*, RFRA), Defendants sought to "be consistent with the *policies of States* that require contraceptive services coverage." *Id.* (emphasis added). This focus was particularly inapt for determining the scope of a religious exemption given that RFRA is inapplicable against States and local governments under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

During the comment period, Defendants received 200,000 comments on the scope of the religious employer exemption, including comments about the Religious Freedom Restoration Act. On January 20, 2012, however, Secretary Sebelius announced that Defendants would not expand the exemption. And in February 2012, Defendants issued regulations that "finalize, without change," the interim final regulations issued in August 2011. Final Rule, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

By February 2012, however, the 200,000 initial commenters were not the only ones riled by the HHS mandate. Even stalwart Democrats were "deeply divided over President Barack Obama's new rule that religious schools and hospitals must provide insurance for free birth control to their employees." Donna Cassata, "Obama birth control policy divides Democrats," Associated Press, Feb. 10, 2012. On Friday, February 10, 2012, the President announced at a press conference that Defendants would attempt to accommodate other employers with

religious objections. At the same time that Defendants finalized their narrow religious employer exemption, then, Defendants also stated their intention to develop an "accommodation" for some (but not all) "non-exempt" employers, and to provide a temporary enforcement safe harbor for these employers in the meantime. *Id*. Defendants asserted—without explanation or analysis—that "this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the least restrictive means to further a compelling government interest." 77 Fed.Reg. 8725, 8729.

By failing to follow RFRA when considering the scope of religion-based exemptions from the contraceptives mandate, Defendants guaranteed that impassioned political considerations would take the place of reasoned legal consideration. That is exactly what RFRA proponents worried would happen under the *Smith* approach that RFRA reversed. *See Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797) ("Religion will be subject to the standard interest-group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading."). Testifying before the Senate Judiciary Committee at the invitation of *then-Senator Biden*,

Professor Douglas Laycock stated that "[i]n a society where regulation is driven by interest groups, *Smith* means that churches will be embroiled in endless political battles with secular interest groups." *Religious Freedom Restoration Act: Hearing before the S. Comm. on the Judiciary*, 102d Cong. 63 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas). And that is exactly what has happened, as *Vice President Biden* has since experienced firsthand. According to multiple press reports, Defendants' shifting policies stem from internal disputes—disputes that have pitted Vice President Biden against others in the Obama Administration. *See* Helene Cooper & Laurie Goodstein, *Obama Adjusts a Rule Covering Contraceptives*, N.Y. Times, Feb. 11, 2012, at A1. The President's promise that Defendants would propose an accommodation reportedly came about only after the Administration faced "rising anger from Catholic Democrats, liberal columnists and left-leaning religious leaders." *Id.*

Thus run the "vicissitudes of political controversy." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Congress walled off religious freedom from these forces with the Religious Freedom Restoration Act. RFRA did this "by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions." *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*,

102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas).

The President's promise of future consideration of an accommodation amounted to an admission that Defendants could not have satisfied RFRA's "least restrictive means" requirement as of that time. For RFRA states that "Government may substantially burden a person's exercise of religion only if it [*i.e.*, the Government] *demonstrates* that application of the burden" complies with the compelling governmental interest and least restrictive means requirements. 42 U.S.C. § 2000bb-1(b) (emphasis added); *see also* 42 U.S.C. § 2000bb-2(3) ("[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."). Defendants could not have made this demonstration based on their actions as of February 2012.

The Defendants *then* committed to consider an accommodation in the *future* because they had not adequately considered an accommodation in the *past*. Without having previously analyzed this potential accommodation, the Government could not have "demonstrat[ed]" that the mandate that it had already chosen and finalized with a narrow religious employer exemption was "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2); *see Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 39 (D.D.C. 2002) ("[T]he government cannot meet its burden to prove least restrictive means unless

it has actually considered and rejected the efficacy of less restrictive measures *before* adopting the challenged practice.") (emphasis added).

Defendants' refusal to address RFRA in any meaningful way (except when sued in federal court) is remarkable. But it is also consistent with the way Defendants have treated the law of religious freedom from the beginning of the HHS mandate. When questioned by RFRA sponsor Senator Hatch at a February 15, 2012, hearing, Secretary Sebelius testified that she never requested an analysis of religious freedom issues surrounding the HHS mandate from the Department of Justice. *The President's Budget for Fiscal Year 2013: Hearing before the S. Comm. on Finance*, 112th Con. (Feb. 15, 2012) (statement of Kathleen Sebelius, Sec'y of Health & Human Servs.). And HHS ignored an October 2011 request from twenty-seven Senators for "any analysis requested or obtained by HHS regarding these religious-liberty issues." *Id.* (statement of Sen. Orrin G. Hatch, ranking member, S. Comm. on Finance).

In March 2012, Defendants issued an Advance Notice of Proposed Rulemaking to "establish alternative ways to fulfill" the contraceptives mandate "when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services for religious reasons and is not exempt under the final regulations published February 15, 2012." 77 Fed.Reg.

16501, 16501 (Mar. 21, 2012). Although it was obviously issued in the shadow of RFRA litigation, the Advance Notice does not even mention RFRA.

On February 6, 2013, Defendants promulgated a Notice of Proposed Rulemaking that changed the definition of "exempt" religious employers and proposed an accommodation for certain other religious employers. 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013). This Notice also further subdivided employers with religious objections from two categories (exempt and non-exempt) into three categories (exempt, non-exempt but accommodated, and neither exempt nor accommodated). In distinguishing between those employers who are non-exempt but accommodated, on the one hand, and those employers who are neither exempt nor accommodated, on the other hand, the Notice makes no reference to RFRA. The Notice refers instead to "the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," which is "available to nonprofit religious organizations but not to for-profit secular organizations." *Id.* at 8462.

B. Defendants' Third-Class Treatment of Plaintiffs' Religious Freedom Violates RFRA's Single Religion-Protective Standard

Defendants' refusal to apply RFRA throughout the administrative process has resulted in a mandate that violates RFRA and turns the law of religious freedom upside down. RFRA places a heavy burden on Government and protects religion by default. But the HHS mandate places a heavy burden on religion and protects Government by default. RFRA's statutory structure – a single rule with a

single exception – reflects the principle that Government should apply the same protective standard to all exercises of religion, by all persons. This principle may seem uncontroversial in the abstract. But the Government can have difficulty honoring this demand in specific circumstances. Defendants' categorical refusal to exempt or accommodate Plaintiffs provides a case in point.

In formulating RFRA, Congress heard testimony about the need for greater protection for the free exercise of religion by organizations as well as individuals. *See, e.g.*, *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("[C]ases like *St. Agnes* depend on RFRA specifying that the compelling interest test is . . . not the watered down deference to every bureaucrat that some lower courts now apply") (citing *St. Agnes Hospital v. Riddick*, 748 F.Supp. 319 (D. Md. 1990)). And Congress did not limit RFRA's protections to individuals. Rather, Congress provided that "[g]overnment shall not substantially burden a *person's* exercise of religion," 42 U.S.C. § 2000bb-1(a), employing a term that ordinarily encompasses "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

Rather than reach the obviously incorrect conclusion that RFRA does not extend to corporations at all, the district court created an exception from RFRA's coverage for "secular, for-profit corporations," incorrectly concluding that such corporations "are not 'persons' for purposes of the RFRA." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278, 1288, 1291-92 (W.D. Okla. 2012). The district court reasoned that "[g]eneral business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion." *Id.* at 1291. But the same can be said of corporations that unquestionably are "persons" under RFRA, such as hospitals, universities, and religious orders.

In attempting to justify their failure to respect religious objections to the HHS mandate asserted by for-profit corporations, Defendants have observed that Congress has sometimes distinguished between nonprofit religious organizations and for-profit secular organizations. 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (discussing Title VII of the Civil Rights Act of 1964). This demonstrates that Congress can distinguish between for-profit and nonprofit employers when it wishes to do so. But Congress made no such distinction in RFRA, which applies broadly and generally, subject only to displacement by later enactments that relax its reach in specific areas. Congress plainly wrote RFRA to include corporations, and neither RFRA nor the PPACA excludes for-profit corporations.

Even though Congress did not provide for different treatment of for-profit and nonprofit employers in either RFRA or the PPACA, Defendants have created a three-tier categorization of religiously objecting employers and have subjected Plaintiffs to third-class treatment in the lowest tier. This contravenes the design of RFRA. Congress knew that a healthy respect for religious freedom as exercised by a variety of actors would call for various government responses appropriate to the circumstances. But rather than attempt to formulate different principles to govern different categories of religious liberty claimants, Congress formulated a single principle and left it to government officials and courts to apply that same principle with sensitivity to different factual circumstances.

One particular episode from Congress's consideration of RFRA clarifies the broad scope of what Congress intended to accomplish by supplying a single standard to protect religious freedom for all. Near the end of legislative debate over RFRA, a group of senators sought an amendment to provide a lower level of protection for prisoners. Both Democratic and Republican senators opposed what Senator Lieberman termed the "dramatic proposal" that there should be "two separate standards for the protection of religious freedoms: protections afforded citizens out of jail and protections afforded incarcerated citizens." 139 Cong. Rec. S14462 (daily ed. Oct. 27, 1993) (statement of Sen. Liberman); *see also id.* at S14465 (statement of Sen. Hatch) ("[T]his amendment sets a dangerous precedent

for religious liberty. The real danger lies not so much in the exemption of prisoners, but in the choice we are making about exempting anyone from the principle of the free exercise of religion. Today we are asked only to exempt prisoners. Tomorrow, however, we will be asked to exempt others. . . . How far we will venture is a legitimate unanswered question."); *id.* at S14466 (statement of Sen. Danforth) ("Congress should not codify group exceptions to fundamental freedoms."); *id.* at S14467 (statement of Sen. Kennedy) ("As we vote today to restore the broad protection for religious freedom envisioned by the Framers of the Constitution, let us not deny this fundamental right to persons in prison.").

The Senate's rejection of this double-standard-for-prisoners amendment vindicated the one-rule-for-everybody principle reflected in RFRA's text and structure. The same Congress that refused to make a separate rule for prisoners and non-prisoners would not have created, and did not create, a separate rule for profit-seeking and nonprofit corporations. Yet that is what the district court ruled. That ruling was incorrect, and the Defendants' continued relegation of for-profit corporations to third-class status in the Administration's invented hierarchy of religious objectors is similarly wrong.

Plaintiffs' claim in this case underscores the importance of applying RFRA's religion-protective standard as Congress intended rather than categorically eliminating a class of religious objectors from its protection. Plaintiffs refuse to

implement the HHS mandate only insofar as it requires facilitating access to "abortion-causing drugs and devices." Jt. App., at 27a (Complaint, ¶ 56). Once Defendants are put to their proper burden under RFRA—to demonstrate that imposing coercive financial penalties for this partial refusal is the least restrictive means of accomplishing a compelling governmental interest—Plaintiffs must prevail.

CONCLUSION

Congress has commanded equal treatment of all under a religion-protective rule. Defendants may not pick and choose whose exercise of religion is protected and whose is not. Amici respectfully ask the Court to reverse the district court's denial of preliminary injunctive relief and to guarantee Plaintiffs the full protection that Congress provided in RFRA by ordering injunctive relief that prohibits Defendants' enforcement of the HHS mandate against them.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. Proc. 32(a)(7)(C), I certify that this brief is proportionally spaced using the Times New Roman font in 14-point type and contains 4,549 words.

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I certify that the information on this certificate is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/ Andrew W. Lester
Andrew W. Lester

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

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/s/ Andrew W. Lester
Andrew W. Lester

February 19, 2013
Date signed

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel of record as set forth below:

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