Nos. 13-354 and 13-356

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HHS, *ET AL.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *ET AL.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*,
Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HHS, *ET AL.*,
Respondents.

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

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BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., INDIVIDUAL PHYSICIANS AND CITIZENS' COUNCIL FOR HEALTH FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PRIVATE PARTIES

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QUESTIONS PRESENTED

1. Whether Congress provided authority to promulgate the contraceptive coverage requirements.
2. Whether a closely held for-profit corporation has free exercise rights that are violated by the contraceptive coverage requirements.

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are individual physicians, an association of physicians whose membership spans the nation, and a nationwide organization of patients

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents in Case No. 13-356 have given blanket consent to the filing of *amici curiae* briefs, as have the Petitioners in Case No. 13-354. Those consents are on file with the Clerk of the Supreme Court. The Respondents in Case No. 13-354 have consented to the filing of this brief. A copy of their consent is being filed concurrently with this brief.

and doctors who support health freedom for patients and doctors.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS"), has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an *amicus* brief by AAPS); *id.* at 959, 963 (Kennedy, J., dissenting) (same). Because AAPS has also commenced an action against the governmental parties which contains allegations of unconstitutionality, the disposition of these Petitions may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d. 19 (D.D.C. 2012) *appeal docketed as* 13-5003 (D.C. Cir. 2013).

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to support patient and doctor freedom, medical innovation, and the right of citizens to a confidential patient-doctor relationship.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., is a psychoanalyst and forensic psychiatrist who has a private practice in Wellesley, Massachusetts.

Amici have studied the introduction, passage and implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 ("HCERA ") as well as various regulations related to ACA. This includes 45 C.F.R. §147; 29 C.F.R. §2590; and 26 C.F.R. §54 (collectively, the "Contraceptive Coverage Requirements" or "CCRs"). 76 Fed. Reg. 46621 *et seq*. *Amici* believe that the CCRs and their authorizing legislation, 42 U.S.C. §300gg-13(a)(4) ("Subsection 13(a)(4)"), enacted as part of Section 1001 of ACA, are unconstitutional and void. If upheld, the CCRs will undermine, in fundamental and dangerous ways, the freedom of religion enjoyed by everyone.

Because *Amici* argue that Subsection 13(a)(4) is unconstitutional, they submit this brief in support of the Petitioners in case no. 13-356[2] and Respondents in case no. 13-354[3] (collectively, the "Private Parties") and opposition to the Respondents in case no. 13-356 and Petitioners in case no. 13-354 (collectively, the "Governmental Parties").

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[2] *Conestoga Wood Specialties Corp. v. Sebelius* ("*Conestoga Wood*").

[3] *Sebelius v. Hobby Lobby Stores, Inc.* ("*Hobby Lobby*").

PRELIMINARY STATEMENT

We must begin with the basics and recognize that our nation "was conceived in liberty." Abraham Lincoln, *Gettysburg Address* (1863) (referencing the date of the Declaration of Independence 87 years earlier). The American Revolution was fought to obtain our liberty and freedoms.

The founders of the United States of America (the "Founders") understood that if the government had the power to carve out even a modest exception to particular freedoms, including religious freedom, then everyone's freedoms would be at risk. Fearing encroachment upon their newly won freedoms, the Founders drafted and ratified a Constitution that dispersed and diffused power along multiple axes in order to prevent an undue concentration of governmental power in anyone's hands, *i.e.* regardless of whether that power were to be exercised by the President, Congress, or even an overbearing faction of citizens, whether those citizens are in the majority or minority. The Founders designed a Constitution that would tend "to break and control the violence of faction." *The Federalist No. 10* at 77 (J. Madison) (Clinton Rossiter, ed. 1961). James Madison explained:

> The latent causes of faction are thus sown into the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning **religion**, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously

> contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.

Id. at 79.[4] As James Madison explained later, a tyranny of the majority is every bit as dangerous as a tyranny of a single monarch. *See generally The Federalist No. 51* (J. Madison).

Our Constitution diffuses power in various ways. Allowing a wide variety of religions to exist and coexist, under the First Amendment, is but one of them. First, power is divided between the federal sovereign and the state sovereigns. Second, power is further diffused among the three branches of the federal government, *i.e.* the Legislative Branch, U.S. CONST. art. I, the Executive Branch, U.S. CONST. art. II, and the Judicial Branch, U.S. CONST. art. III.[5] The

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[4] The members of this Court are well aware of the instances in world history, from ancient times until today, where religious conflict has led to prolonged wars (*e.g.*, the Crusades), and hatred of a religious group or groups by certain governments has horrifically led to genocide (*e.g.*, during World War II).

[5] *Muskrat v. United States*, 219 U.S. 346, 352 (1911) ("That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that

Bicameral Clause further diffuses federal legislative power by dividing Congress into two separate chambers, the Senate and the House of Representatives. U.S. CONST. art. I, §1.

The Constitution further diffuses power by limiting the length of the terms of the President and of members of the Senate and the House of Representatives. The President is elected for four years. U.S. CONST. art. II, § 1, cl. 1. A Senator is elected for six years. U.S. CONST. art. I, § 3, cl. 1&2 and U.S. CONST. amend. XVII. And, a member of the House of Representatives is elected for two years. U.S. CONST. art. I, § 2, cl. 1. Finally, the Founders sought to partition society into "so many parts, interests and classes of citizens," that neither the rulers nor a "majority united by a common interest" could infringe or eliminate the rights of a minority. *The Federalist No. 51* (J. Madison) at 322 ("Ambition must be made to counteract ambition"). James Madison pointed out that:

> [i]n a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the **multiplicity of sects**. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

Id. at 324 (emphasis added).

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it is the duty of each to abstain from, and to oppose, encroachments on either").

Although the Government's "Question Presented" asks the Court to focus on the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*., that focus misdirects the Court's energies because the RFRA need not be invoked. Petitioners' Brief on the Merits in 13-354. It is black-letter law that without a Constitutional Amendment enacted pursuant to Article V, a statute may only augment, not detract from, the First Amendment. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) ("*Thornton*"); and *Clinton v. City of New York*, 524 U.S. 417, 449 (1998). The Court may not utilize rationales related to the RFRA to analyze the First Amendment because the First Amendment rights are available under the facts of this case. In other words, the Court should look at the First Amendment first. *Compare Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) ("*Citizens United*") *with Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

SUMMARY OF ARGUMENT

Based on the unqualified language and history of the Free Exercise Clause, a corporation may bring a Free Exercise challenge against the Federal Government. The unqualified language of the Free Exercise Clause stands in striking contrast to the Fifth Amendment's requirement that process only be "due" or the Fourth Amendment's requirement that a search and seizure be "reasonable".

The CCRs should be considered void, *i.e.* non-existent, based upon the failure of Congress to adhere to the Constitution's strict lawmaking requirements. Congress impermissibly transferred legislative power

to the governmental authorities because the CCRs are legislative in nature, scope and effect, which requires bicameral passage by Congress and presentment to the President. Congress also violated the Non-Delegation Doctrine by delegating rulemaking authority to the Governmental Parties without any boundaries or limits on the delegations.

By ignoring the statutory incoherence that results from the admitted grammatical errors in Subsection 13(a)(4), and interpreting that subsection as though it were written differently, the courts below have erred. A court's duty is take a statute as it is written. No court, including this Court, has the power to rewrite the words (and punctuations) of Congress. The Court should not overstep its constitutionally assigned role and serve as a judicial "Council of Revision."[6]

ARGUMENT

Failure to comply with the Constitution's strict lawmaking requirements renders any law void *ab initio*. Any non-compliant law must be declared unconstitutional, regardless of its merits and regardless of whether the law was passed by a single vote or by a unanimous vote in both chambers. By protecting Congress from itself, the Court protects the People. *Amici* believe that Subsection 13(a)(4) is such a non-compliant law.

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[6] *See infra* page 24.

I. CONGRESS PROVIDED NO AUTHORITY TO PROMULGATE THE CONTRACEPTIVE COVERAGE REQUIREMENTS BECAUSE SUBSECTION 13(a)(4) IS VOID.

In *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012) ("*NFIB*"), this Court made and re-made the point that every action by the Federal Government must not only be based on an enumerated power and but also not violate any other provision of the Constitution. *NFIB,* 132 S.Ct. at 2577 (Robert, C.J.) ("Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place."); *see also id.* at 2598 ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution"). The Bicameral Clause and the Non-Delegation Doctrine have been violated herein.

A. Subsection 13(a)(4) Is Void Because It Directs the Governmental Parties to Issue Regulations Which Are Legislative in Nature, Scope and Effect, in Violation of the Bicameral Clause.

Although not every action taken by Congress is subject to the bicameralism and presentment requirements, those requirements must be met whenever legislative power is exercised by Congress or any other Federal entity. U.S. CONST. art. I, § 1 ("**All legislative power** shall be vested in a

Congress of the United States, which shall consist of a Senate and House of Representatives").[7] Whether particular actions are an "exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in character and effect.'" *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952 (1983) (*quoting* S. Rep. No. 1335, 54th Cong., 2d Sess. (1897)).

The legislative character of an action may be established by examining the Congressional action that it supplants. This "Supplantation Principle" was used to analyzed the constitutionality of the legislative veto in *Chadha*. *Chadha*, 462 U.S. at 952 ("The legislative character of the one-House veto in these cases is confirmed by the character of the Congressional Action it supplants"). The Court should now extend that principle to actions of executive departments, independent agencies and the judiciary. *Amici* suggest that there is no reason not to apply that principle to non-Congressional exercises of legislative power.

In *Chadha*, the constitutionality of the legislative veto provision in Section 244(c)(2) of the Immigration and Nationality Act was at issue. This Court examined Section 244(c)(2) and found that it had an essentially legislative purpose and effect. Although the Court acknowledged that Section 244(c)(2) authorized one house, by resolution, to require the Attorney General to deport an alien whose deportation would otherwise be canceled under

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[7] Congress may act unilaterally in certain defined circumstances. *Chadha,* 462 U.S. at 955-56.

Section 244, the Court reasoned that "the House took action that had the ***purpose and effect of altering the legal rights, duties and relations of persons***, including the Attorney General, Executive Branch officials and Chadha, all outside the Executive Branch." 462 U.S. at 952 (emphasis added). The Court explained that without the House's action, Chadha would remain in the United States. Congress had acted and that action had altered Chadha's status. Without the challenged provision, Chadha's deportation could only have been accomplished by legislation requiring deportation, if at all. *See id.* at 953-54.

The Court also examined the nature of the decision implemented by the legislative veto. "After long experience with the … private bill procedure, Congress … [chose] to delegate to the … Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances." *Id.* at 954. The Court stated the choice to delegate was

> precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation - that is, Congress' decision to deport Chadha - no less than Congress' original choice to delegate … involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Id. at 954-55.

Subsection 13(a)(4) impermissibly delegates legislative power in two ways. First, any alleged authority of the Governmental Parties to promulgate the regulations arises only after the Institute of Medicine makes recommendations to the Health Resources and Services Administration ("HRSA"). Second, these regulations had the purpose and intended effect of altering the rights, duties, and relations of persons, including employers, employees, patients, providers, health insurance issuers, and health plans, all outside of Congress.

The intervals specified in Subsection 13(b) reinforce this conclusion. Subsection 13(b) provides:

> The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

This suggests that Congress was writing on a blank slate when it enacted Subsection 13(a)(4) because Congress needed to be better informed regarding such recommendations and guidelines.

This understanding is consistent with Subsections (a)(1,2, &3) under which Congress explicitly sought recommendations from the United States Preventative Services Task Force and the Advisory Committee on Immunization Practices of the Centers for Disease Control and guidelines from the HRSA. Subsections (a)(1,2 & 3) and (b) reveal that Congress had not yet made any policy determination or value

judgment regarding the recommendations and guidelines when it enacted Subsection 13(a)(4). Subsection 13(a)(4) left the difficult policy choices to the unelected HRSA and IOM. *See* Marci Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 820 (1999) [hereinafter, "*Representation and Nondelegation*"] ("The legislature holds primary responsibility to make the national policy choices, and the President may not take on those choices."); *Clinton*, 524 U.S. at 442-45, 445 n.38. Congress had not yet balanced the interests of various constituencies regarding the subject matter specified in Subsection 13(a)(4).[8]

By declaring that Subsection 13(a)(4) is unconstitutional on the basis that it impermissibly delegates legislative power to the Governmental Parties, the Court may avoid a much thornier constitutional issue - whether delegated legislative authority is subject to the same time limit as imposed on each and every member of the House of Representatives by his or her two year term. This issue arises here because the HRSA had not issued

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[8] Institutionally Congress is better able to balance multiple viewpoints than a single agency, executive department, or quasi-governmental entity:

> The legislative branch serves the people by filtering the factions in the society and distilling those laws that will best serve the nation …. [P]ositions must be funneled through a large number of ports before becoming governing law. … As a result, it is capable of reaching more nuanced compromises on national issues.

Representation and Nondelegation, 20 CARDOZO L. REV. at 814. In contrast, when lawmaking is delegated to an agency, executive department, or quasi-governmental entity, the viewpoint is narrower and without any electoral accountability.

its guidelines prior to August 3, 2011, a date that is eight months after the expiration of the 111th Congress. 76 Fed. Reg. 46624, at col. 2 (Aug. 3, 2011). There is a two-year limit on the legislative franchise given to each and every member of the House of Representatives. It is axiomatic that Congress may not delegate what it can never possess. The 111th Congress could not have enacted the guidelines as legislation beyond the last day of its term. Therefore, it is impossible for the agent of Congress – the HRSA – to do so. Indeed, this Court has recognized that "each branch, in its own way, is the people's agent, its fiduciary for certain purposes." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("*MWAA*") (internal citation omitted). Under the Constitution, the people give each and every member of Congress two and only two years to act. U.S. CONST. art. I, § 2, cl. 1.

B. Subsection 13(a)(4) Is Void Because Its Delegations to the Governmental Parties Are Unbounded.

Under the "intelligible principles" test, it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (*quoting American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)). In addition, a delegation is always subject to the legislation that authorized it. *Chadha*, 462 U.S. at 953-54 n.16.

The Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const. Art. I, § 1, and may not be conveyed to another branch or

entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Accordingly, "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

It has been suggested that delegation to administrative agencies leaves a gaping hole in the Constitution's balanced structure of checks and balances whenever agencies become arbitrary and unaccountable. "The nondelegation doctrine in this scenario is crucial to liberty, because it prohibits general lawmaking from occurring in a structure both capable of arbitrary action and removed from the national scrutiny to which both Congress and the President are exposed by the constitutional structure." *Representation and Nondelegation*, 20 CARDOZO L. REV. at 821.

Subsection 13(a)(4) provides no marker or check to determine whether HHS exceeded the authority passed by Congress. *See Yakus v. United States*, 321 U.S. 414, 423-24 (1944); *Chadha*, 462 U.S. at 953.

This subsection containing the phrase "such additional preventive care and screenings not described in paragraph (1)" is a problem. That phrase removed any and all limits on the authority of the Governmental Parties. *See A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

By omitting boundaries from Subsection 13(a)(4), Congress enables the Governmental Parties to address an infinite number of subjects.[9] In *Whitman v. American Trucking Associations, Inc.*, the Supreme Court said, "[t]he very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority." 531 U.S. 457, 473 (2001). HHS has exercised such forbidden legislative authority.

II. BECAUSE SUBSECTION 13(a)(4) IS DIRECTED AT SINCERELY HELD RELIGIOUS BELIEFS, IT VIOLATES THE FREE EXERCISE CLAUSE AND IS VOID.

As the Private Parties contend, the Contraceptive Coverage Requirements are antithetical to their sincerely held religious beliefs. The Governmental

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[9] To clarify this point, the Court might consider the following hypothetical example involving another Executive Department,. Assume *arguendo* that Congress passed a statute that authorized the United States Department of Agriculture ("DoA") to issue regulations concerning "at least" broccoli, ketchup, and hot dogs. Under the construction of Subsection 13(a)(4) suggested by the Governmental Parties, the DoA would be allowed to regulate not just those three items, but also would be allowed to regulate an infinite number of other items (*e.g.* cauliflower, oranges, tomatoes, *etc.*), even if Congress and the President never agree to regulate those other items.

Parties do not dispute this contention. Governmental Parties, Brief for Petitioners in 13-354 at 12 ("The Greens' sincerely held religious opposition to certain forms of contraception is not subject to question in these proceedings, and their personal beliefs merit the full measure of protection that the Constitution and laws provide."). Instead, the Governmental Parties suggest that Free Exercise rights may be asserted only by individuals and not by for-profit corporations. The First Amendment is not so limited.

Indeed, on numerous occasions, the Court has held that corporations are entitled to First Amendment protections. *Citizens United*, 558 U.S. at 342 (citing approximately twenty Supreme Court cases for the proposition that "[t]he Court has recognized that First Amendment protection extends to corporations"). Here, the Court should hold that violations of the Free Exercise Clause are also protected by the First Amendment.

A. The First Amendment Protects Inward Beliefs and Outward Expressions.

In *Citizens United*, the Justice Kennedy said:

> Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable,

> pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, must give the benefit of any doubt to protecting rather than stifling speech.

Citizens United, 558 U.S. at 327 (inner quotation marks omitted). The line protecting the free exercise of religion must be so bright and clear that there can be no doubt that religious exercise is protected rather than prevented.

"Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. The First Amendment protects both inward beliefs, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …."), and outward expressions, U.S. CONST. amend. I ("Congress shall make no law … abridging the freedom of speech, or of the press …. "). The First Amendment also protects the right of the people to act collectively. U.S. CONST. amend. I ("Congress shall make no law … abridging … the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

B. Corporations May Assert Free Exercise Clause Violations Because Religions Have Both Collective and Individual Aspects.

The essence of the Governmental Parties' argument is that only individuals and certain not for-profit entities may challenge the Government's

actions.[10] This argument simply ignores the fact that most religions have collective as well as individual aspects and members of many religions construct buildings for group prayer. For example, one may find group prayer in a Buddhist temple, a Catholic or Protestant Church, or a Jewish synagogue. *See e.g.*, Merriam-Webster's Encyclopedia of World Religions 239 (Wendy Doniger, consulting ed., 1999) (Under the entry for "CHURCH" we find "[t]he Greek word *ekklesia*, which came to mean church, was originally applied in the classical period to an official **assembly** of citizens.") (emphasis added).

In many towns and cities across this country one may find churches, temples, etc. for the collective exercise of religion along either "Main Street" or a street whose name reflects the religious building located thereon.[11] For example one may find Church Avenue in the center of Brooklyn, New York, Church Street in lower Manhattan, New York, and Temple Street in New Haven, Connecticut.

In his dissent to the *Conestoga Wood* decision below, Judge Jordan eloquently made the point that exercising freedom of religion is both a collective right and an individual right. He said:

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[10] Judge Jordan quoted *Hobby Lobby* in observing, "Because the First Amendment protects speech and religious activity generally, an entity's profit-seeking motive is not sufficient to defeat its speech or free exercise claims. 'We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.'" *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 404 (3d Cir. 2013) (Jordan, J., dissenting) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013), internal citation omitted).

[11] *See* Merriam-Webster's Encyclopedia of World Religions.

> Contrary to the Majority's conclusion, there is nothing about the "nature, history, and purpose" of religious exercise that limits it to individuals. Quite the opposite; **believers have from time immemorial sought strength in numbers. They lift one another's faith and, through their combined efforts, increase their capacity to meet the demands of their doctrine. The use of the word "congregation" for religious groups developed for a reason.** Christians, for example, may rightly understand the Lord's statement that, "where two or three are gathered together in my name, there am I in the midst of them," Matt. 18:20, to be not only a promise of spiritual outpouring but also an organizational directive. It thus cannot be said that religious exercise is a purely personal right, one that "cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 U.S. 694, 699 (1944).

Conestoga, 724 F.3d at 400-01 (Jordan, J., dissenting) (emphasis added). The organizational directive in the Old Testament perhaps is even clearer. In Deuteronomy 18:16 we find the people assembled to receive the Torah.

Finally, the Court might also consider that corporations do not exist in a vacuum, but, rather, are operated and managed by their officers, directors and employees. Consequently, corporations should be able to assert violations of the Free Exercise Clause.

Amici strongly believe that the free exercise rights of the Private Parties are within the broad reach of the First Amendment. As Judge Noonan of the Ninth Circuit said:

> The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that [for-profit corporations may] rightly invoke [ ]. Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.

EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting).[12]

C. While the Language of the Fourth And Fifth Amendments Qualifies Their Protections, The Language of the First Amendment Is Unqualified.

Religious freedom has been inextricably intertwined with our nation's history, from the earliest settlers until today. The First Amendment protects this and other freedoms. The protections afforded by the language of the First Amendment are not qualified. This contrasts with the language qualifying the protections afforded by the Fourth Amendment ("reasonable" searches and seizures) and the Fifth Amendment ("due" process). The government's position, challenging the right of corporations to bring Free Exercise Clause cases, is directly antithetical to the First Amendment (which

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[12] Cited in Judge Jordan's dissent in *Conestoga Wood*, 724 F.3d at 404-05 (Jordan, J., dissenting).

recognizes the right "peaceably to assemble"). Furthermore, the government's position cannot be reconciled with the *Citizens United* case.

Strict adherence to the Free Exercise Clause is consistent with our nation's history of serving as a beacon to those escaping from religious persecution. Shortly after the ratification of the Constitution and during the ratification of the Bill of Rights, Tench Coxe wrote:

> The situation of religious rights in the American states, though also well known, is too important, too precious a circumstance to be omitted. Almost every sect and form of Christianity is known here– as also the Hebrew church. None are [just] tolerated. **All are admitted,** aided by mutual charity and concord, and supported and cherished by the laws. In this land of promise for the good men of all denominations, are actually to be found, the independent or congregational church from England, the protestant episcopal church (separated by our revolution from the church of England) the quaker church, the English, Scotch, Irish and Dutch presbyterian or calvinist churches, the Roman catholic church, the German Lutheran church, the German reformed church, the baptist and anabaptist churches, the hugonot or French protestant church, the Moravian church, the Swedish episcopal church, the seceders from the Scotch church, the menonist church, with other christian sects, and the Hebrew church. **Mere toleration is a doctrine exploded by our general condition; instead of which have been substituted an unqualified admission, and assertion, "that**

> **their own modes of worship and of faith equally belong to all the worshippers of God, of whatever church, sect, or denomination."**

Tench Coxe, Notes Concerning the United States of America (1790) (emphasis added) (capitalizations in original), *reprinted in* The Founders' Constitution, Volume 5, Amendment I, Document 55 (Philip B. Kurland and Ralph Lerner eds., 1987).

Finally, the Court should look at the current religious and ethnic composition of the United States to realize that the Founders "got it right" when they ratified the religion clauses of the First Amendment right. ProQuest, Statistical Abstract of the United States 2013, at Table 80 (December 2012) (Listing population statistics for 26 religious sects with populations greater than 500,000 persons); *see also*, Emma Lazarus, *The New Colossus* (1883) (This poem is engraved on a bronze plaque mounted within the pedestal of the Statue of Liberty) ("Give me your tired, your poor, your huddle masses yearning to breathe free…").[13]

III. THE COURT MAY NOT AGGRANDIZE LEGISLATIVE POWER BY IGNORING THE STATUTORY INCOHERENCE RESULTANT FROM THE GRAMMATICAL ERRORS IN SUBSECTION 13(a)(4).

This case is about the allocation of powers between and among the branches. It is not about what the law "ought to be" or "should be." It is about what the law "is". *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty

[13] www.libertystatepark.com/emma.htm (viewed on 1/24/14).

of the judicial department to say **what the law is**.") (emphasis added).

As enacted, Subsection 13(a)(4) provides: "with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4), 124 Stat. at 131.

Despite the maxim that legislators are presumed to know the rules of grammar, Congress enacted Subsection 13(a)(4) with several grammatical errors that render its text incoherent. The judiciary, like the President, has no power to rewrite a statute.[14] Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374).

Specifically, Congress placed a period both before and after Subsection 13(a)(4). It also placed the word "and" between Subsections 13(a)(2) and 13(a)(3). This period provides strong evidence that Subsection 13(a)(3) terminates Subsection 13(a) and establishes Subsection 13(a)(4) as its own sentence. As a separate sentence, Subsection 13(a)(4) is an incomplete thought. It is a subject without a predicate. No conduct is permitted, prohibited or directed.

Furthermore, the reference to "paragraph 1" in Subsection 13(a)(4) is extremely unclear. It does not

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[14] That power is not transferrable to the Judiciary by Congress.

refer to Subsection 13(a)(1). If Congress had wanted to refer to Subsection 13(a)(1) there, it would have used the term "Subsection 13(a)(1)". Indeed, Congress specifically referred to "Subsection 13(a)(1)" in Subsection 13(b)(1). Congress expressly used the word "subsection" in referring to Subsections 13(a)(2) and 13(a)(3) as well. Subsection 13(b)(1) provides:

> The Secretary shall establish a minimum interval between the date on which a recommendation described in **subsection (a)(1) or (a)(2)** or a guideline under **subsection (a)(3)** is issued and the plan year with respect to which the requirement described in **subsection (a)** is effective with respect to the service described in such recommendation or guideline.

42 U.S.C. § 300gg-13(b)(1), 124 Stat. at 132 (emphasis added). *Amici* believe that these mistakes render Subsection 13(a)(4) void. To avoid the possibility that Subsection 13(a)(4) is void, the Governmental Parties have made arguments that make sense only if the Court interprets the law as it "should be" rather than as it is written. On the first two pages of the Appendix to their brief, the Governmental Parties admitted to three grammatical errors that Congress made involving Subsection 13(a)(4). Appendix to Petitioners' Brief 13-354, at 1a n.1&2 and 2a n.2 (footnotes explicitly suggesting what the law should be).

While, under the Recommendation Clause, U.S. CONST. art. II, § 3, the Executive Branch always may suggest to Congress what the law "should be," it is irrelevant to the Judiciary what the law "should be." The Judiciary is compelled to take a Federal statute as it is written and interpret it accordingly. When

Subsection 13(a)(4) is taken as written, *i.e.* a separate sentence, it provides no regulatory authority to the Governmental Parties.

The Separation of Powers Doctrine, as implemented by the language and structure of the Constitution, prevents the Judiciary from altering the language passed by Congress and signed by the President. *Amici* suggest that the Contraceptive Coverage Requirements are only authorized if the Court interprets Subsection 13(a)(4) as it "should be" rather than as it was enacted. Neither the Judiciary nor the Executive Branch may expand or contract what Congress has said. Thus, a judicial modification to enacted legislation, no matter how slight, ignores the Presentment and Bicameral Clauses. In *Clinton,* the Court struck down a Presidential line item veto to enacted legislation. 524 U.S. 417. The Court reasoned that "[i]f one paragraph of that text had been omitted at any one of those three stages, Public Law 105-33 would not have been validly enacted." *Id.* at 448. *Amici* suggest that a change of even a single word or punctuation is sufficient to void a statute as evading the "single, finely wrought and exhaustively considered procedure" contained in the Bicameral and Presentment Clauses. *Clinton*, 524 U.S. at 439-40; *Chadha*, 462 U.S. at 951; *MWAA,* 501 U.S. at 276.

The principle that neither the Judiciary nor the President may unilaterally exercise legislative power applies equally to the Executive Departments and their subordinate agencies. Thus, the Governmental Parties are prevented from pursuing an argument based on what the law "should be" instead of what was enacted. *See* Appendix to Petitioners' Brief 13-354 at 1a n.1&2 and 2a n.2. In other words, based

on Subsection 13(a)(4), as written, the Contraceptive Coverage Requirements were promulgated *ultra vires*. The Contraceptive Coverage Requirements conflict with Subsection 13(a)(4) as it was written. The existence of such a dispensing power in the Governmental Parties is not permitted.

Concerns of encroachment and aggrandizement of legislative power, as well as the abdication of legislative power by Congress, have been an integral part of this Court's Separation of Powers jurisprudence. *Mistretta*, 488 U.S. at 382 ("It is this concern of encroachment and aggrandizement that has animated our separation of powers jurisprudence ….").

The Separation of Powers Doctrine does not merely protect each branch from encroachments by the other two branches. Rather, the doctrine protects the people from an undue concentration of power in any branch. *MWAA*, 501 U.S. at 272 ("The structure of our Government as conceived by the Framers … disperses the federal power among the three branches ... placing both substantive and procedural limitations on each. *The ultimate purpose of this separation of powers is to protect the liberty and security of the governed*") (emphasis added).[15]

Furthermore, when an agency or executive department picks or chooses which laws or regulations to "faithfully execute", it turns rulemaking or executive action on its head – agency

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[15] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court indicated the system of separated powers and checks and balances was regarded by the Framers "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122.

or executive department actions would control legislation instead of the rulemaking or executive action being controlled by the legislation. Such a doctrine – agency or department control of legislation – has no support in the Constitution. It asserts a principle which would provide the executive departments, independent agencies and the President with an unlimited power – "a power to control the legislation of [C]ongress and paralyze the administration of justice." *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 613 (1838).

Because Subsection 13(a)(4) is separate and distinct from Subsections 13(a)(1-3) as well as from Subsection 13(a)(5), Subsection 13(a)(4) provided no basis for the promulgation of the Contraceptive Coverage Requirements. The CCRs are a nullity. For the CCRs to become the law of the land, a corrected version of Subsection 13(a)(4), containing Subsection 13(a)(4) as it "should be," would have to be introduced into and passed by both Houses of Congress and then be signed by the President.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision in *Hobby Lobby* and reverse the decision in *Conestoga Wood*.

Respectfully submitted,

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