In the Supreme Court of the United States

Kathleen Sebelius, Secretary of Health and Human Services, et al., Petitioners
v.
Hobby Lobby Stores, Inc., et al.

A Concurring Opinion by Justice Antonin Scalia

By Bruce T. Murray

The Supreme Court and Religious Liberty

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Scalia, J., delivered a separate concurring opinion.

This case could be resolved easily in several different ways – textually, constitutionally, and based on our own longstanding precedent in Free Exercise cases. But out of an exceedingly generous deference to the wisdom of Congress, my colleagues on the Court have decided this case statutorily – based primarily on the Religious Freedom Restoration Act (RFRA) and the standard(s) it imposed on this Court (whatever those standards are supposed to be, which I will discuss in due course.)

RFRA or not, that is no matter. We could resolve this case the same way using strict scrutiny, the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and most importantly, this case can be definitively resolved under our precedent set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990). In other words, this case can be resolved as the Court has done it here – applying strict scrutiny – which affords the **least** amount of deference to Congress and is the death-knell for unconstitutional legislation; or we could reach the same conclusion under the more lenient standard set out in *Smith*, which provides substantial deference to legislative action, while simultaneously constraining unwarranted judicial intervention. Under the *Smith* deferential standard or even the mere rational basis standard, it is abundantly clear that that Congress and the Health and Human Services Department have acted unreasonably and unconstitutionally in denying the Respondents-Hobby Lobby's First Amendment guarantee of the Free Exercise of religion.

I prefer to analyze this case under *Smith*, even though RFRA purports to lead us to the same conclusion, precisely because *Smith* makes the case **easier** for the Government and more difficult for the Respondents. Thus, by the stronger argument, with all the deference one can muster for Congress and the Health and Human Services Department, the government still fails. Therefore, I concur with the Court's judgment, but I do not join with the Majority's opinion.

As this Court proclaimed in its most formative decision, "an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). It is axiomatic – that which is truly repugnant to the constitution is just as surely rancid to a sensitive, "strict" nose as it is to a more liberal, deferential nose. Here, the Health and Human Services Department's errant promulgation of the Affordable Care Act – arbitrarily granting religious exemptions there and denying them here – directly conflicts with this nation's "First Liberty," religious liberty. By forcing Hobby Lobby, as incorporated by the Green family, to provide its employees with contraceptives that constitute abortion-substitutes, both Congress and the HHA have surely infringed on the Greens' Free Exercise rights – expressed either individually or through their corporation. Therefore, in Justice Marshall's parlance, HHA has acted repugnantly – as empowered by repugnant provision of the ACA.

Before turning to a *Smith* analysis, this case presents two "gateway" issues: (1) What judicial standard the Religious Freedom Restoration Act purports to mandate for analyzing Free Exercise cases, and (2) whether the Act covers corporations as "persons" for the purposes of enjoying the guarantees of the First Amendment. Based on text and tradition, the answer to the second question is "Yes." With regard to the first question, a

close textual examination of the RFRA reveals its internal textual ambiguity. An even closer scrutiny of the Act uncovers its inherent constitutional weakness. I will discuss these issues in turn.

The Religious Freedom Restoration Act: Congressional confusion and hysteria

First, some background is in order. In 1993, Congress passed RFRA in direct response to our decision in *Smith.* The Act purported to restore the *Sherbert–Yoder* standard for Free Exercise cases. That is, under our precedent in those cases, the government's "compelling interest" must be balanced against the "substantial burden" imposed on one's free exercise of religion. 42 USCS § 2000bb. But then on the very next page of the Act, it purports to require this Court to engage in a strict scrutiny analysis, i.e., that the Government may not substantially burden a person's exercise of religion unless "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 USCS § 2000bb-1 (emphasis added).

So which is it – a balancing test, or strict scrutiny? We don't know. Apparently, Congress didn't know either when it breathlessly enacted this carelessly drafted legislation. Indeed, while opening discussion of the bill during the House Judiciary Committee hearings, the Hon. Don Edwards (D-Calif.) confidently proclaimed, "Over the years, the Supreme Court has developed a 'compelling state interest' standard to test the constitutionality of governmental restrictions on religion. Under this long-established test, a law can interfere with religious freedom only if it is the least restrictive means possible to protect a compelling state interest." *Religious Freedom Restoration Act of*

1990: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 101th Cong. 2 (1990) (statement of Rep. Edwards, Chairman, H. Subcomm. on Civil and Constitutional Rights). There, in two succinct sentences, the distinguished chair conflates the two standards – the *Sherbert-Yoder* balancing test and strict scrutiny. Throughout the course of the hearings, none of the other members of Mr. Edwards' august committee attempted to correct him. It is therefore reasonable to infer that most, if not all of them don't even know the difference between these two standards of judicial review – subtle as they may be – but no trifling matter when it comes to adjudicating from the highest Court in the land.

The devil is in the details, I suppose, so why go there? See *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 391 (2000) (Scalia, J., concurring, "just for the devil of it.") Instead, in an impressive demonstration of hyperbole, the Hon. Mr. Solarz (D-N.Y.) went on to compare this Court's decision in *Smith* unfavorably with recent acts of the Supreme Soviet (*Id.* at 13); the Hon. Lamar Smith (R-Tex.) likened this Court's "tyrannizing the minority" to the Holocaust (*Id.* at 22); and kindly, the Hon. Mr. Dannemeyer (R-Calif.) characterized our *Smith* decision merely as an "embarrassment" (*Id.* at 8). I suppose it would be unreasonable to expect coherent legislation to come out of such frenzied hysteria and flat-out ignorance.

We have seen many recent examples of a Congress hopelessly confused – and its legislation correspondingly incoherent – in other First Amendment-related contexts. For example, in the area of campaign finance "reform," Congress gracelessly traversed its bases for limiting campaign contributions from the problem of "actual corruption" to "the appearance of corruption" before moving on to various Congress members' distaste for

negative "attack" ads to the amazing discovery that "there is too much money spent on elections." *McConnell v. FEC,* 540 U.S. 93, 261 (2003). In the floor debates, Senator Daschle told us how these attack ads, which the First Amendment surely protects, are like "crack cocaine," 144 Cong. Rec. S868 (Feb. 24, 1998) (remarks of Sen. Daschle); and Sen. Durban told us how this kind of political speech is akin to "drive-by shootings." *Id.,* at S879 (remarks of Sen. Durbin). See *McConnell,* 540 U.S. 93 at 261 (Scalia, J., concurring and dissenting).

During a debate regarding Free Speech, I suppose it is appropriate for Congress members to employ such flowery metaphors. A Free Exercise debate is similarly inspiring for them. During the RFRA debates, Mr. Dannemeyer mused, "Justice Scalia, for whom I have the greatest respect—I don't know what he had for dinner the night before, when he produced this [*Smith*] decision." Subcomm. Hearings, *supra,* at 7. Likewise, one can only guess what Congress was smoking when it passed the Religious Freedom Restoration Act, and as a consequence the Court is forced to squint through a cloud of second-hand, obfuscating smoke known as RFRA. See *McCreary County v. ACLU,* 545 U.S. 844, 897 (2005) (Scalia, J., dissenting, "I am at a loss to see how this helps his case, except by providing a cloud of obfuscating smoke.")

In a better world, RFRA would be struck down on incoherence alone. Short of that, thankfully, as we have narrowly construed it, RFRA has no application to the states. *City of Boerne v. Flores,* 521 U.S. 507 (1997). "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* at 532 (Kennedy, J., writing for the

Court). Similarly, insofar as the Act attempts to alter the substantive meaning of the First Amendment and commandeer this Court's standard of review, it should also be struck down as it applies to the federal government. But that is an issue for another day.

So here we are now, attempting to divine meaning from the sloppy heap of words comprising the RFRA. Mr. Solarz consecrated RFRA as an act which "closely approximates motherhood and apple pie." Subcomm. Hearings, *supra,* at 13. In reality, RFRA constitutes a congressional "prophylactic" wrapped around the Free Exercise Clause. As we have said in other contexts, prophylactic "rights" are "not themselves rights protected by the Constitution," but merely externally imposed rules designed to protect the underlying constitutional rights. *New York v. Quarles,* 467 U.S. 649, 653, (1984), quoted in *Dickerson v. United States,* 530 U.S. 428, 437 (2000) (Rehnquist, C.J., writing for the Court). As a prophylactic, the rights RFRA purportedly grants are not equivalent to the rights protected by the First Amendment's Free Exercise Clause. Instead, RFRA steps in front of the Free Exercise Clause as its guardian. The shield, unfortunately, is made of poor cloth. In devising this malformed prophylactic known as RFRA, Congress has designed and manufactured a defective product that fails constitutionally and fails to define the standards it purports to set out: Strict scrutiny or a balancing test? Hearken back to *Sherbert-Yoder,* or lurch forward to a new standard? Applicable only to individuals or corporations? I suppose the answer is to be found somewhere in a delicious slice of Mom's apple pie. But probably not.

Whatever RFRA means or doesn't mean, it is of no consequence here. For the purposes of resolving the questions in this case, they can be resolved the same way under any standard that could be ascribed to RFRA; and by the stronger argument, I will resolve

this case under a *Smith* analysis – which will follow my discussion of the next gateway question:

Corporations as persons – a 'no-brainer'

The briefs for both the Petitioners and Respondents quibble at length about this issue, but it really is a no-brainer.

Under RFRA, "Government may substantially burden **a person's** exercise of religion only if …" 42 USCS § 2000bb-1. (Emphasis added.) Then, under the Dictionary Act, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 USCS § 1. In terms of the statutory analysis, we are done. This is the beauty of textualism: When properly applied, it can lend so much simplicity to a seemingly complex problem. As William of Ockham (1287-1347) said, "Entia non sunt multiplicanda praeter necessitatem" (Entities must not be multiplied beyond necessity); or otherwise stated, "among competing hypotheses, the one with the fewest assumptions should be selected." Phil Gibbs, "What is Occam's Razor?" (1996), http://math.ucr.edu/home/baez/physics/General/occam.html

Unfortunately in this case, deciding the issue solely on the basis of statute does not provide a solid basis for a decision. As is abundantly clear, RFRA is a defective product, and decisions based on it will therefore be flimsy and subject to future attack.

The issue of whether corporate entities can enjoy First Amendment guarantees is therefore best decided constitutionally. Our recent case law has addressed the key question here in the affirmative: Corporations are indeed covered by the First

Amendment. In the context of campaign finance, we held that the government cannot suppress political speech on the basis of the speaker's identity as a nonprofit or for-profit corporation. *Citizens United v. FEC*, 558 U.S. 310 (2010).

> "Political speech does not lose First Amendment protection simply because its source is a corporation. The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. The United States Supreme Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 342 (Kennedy, J., writing for the Court).

In other words, the right that flows from the First Amendment – be it speech or free exercise – is what is most valuable, regardless of whether the speech emanates from an individual or an association of individuals. *Citizens United*, supra, at 386 (Scalia, J., concurring). "The Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals." *Id.* at 392.

Similarly here, the right to free exercise of religion is not constrained to a single individual or denied to an association of individuals – however they are organized or incorporated. Reaching this conclusion, as with any sound originalist analysis, begins with looking to the text of the Amendment: Specifically, does the text anywhere include only individuals and specifically exclude associations of individuals? The answer here is

plainly no. The next step in an originalist analysis looks to history and tradition. In this case, "the lack of a textual exception for free exercise by corporations cannot be explained on the ground that such organizations did not exist or did not profess religious views at the time of the founding. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter. See 1 W. Blackstone, Commentaries on the Laws of England 455-473 (1765)." *Id.* at 388.

Justice Stevens, in a faux attempt at originalism, offered a detailed and distorted description of the Framers' views about the role of corporations in society. *Citizens United*, supra, at 386. The Framers did not like corporations, he opines, "and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted – not, as the dissent suggests, as a freestanding substitute for that text." *Id.* Justice Stevens dredges up an impressive array corporation-hating quotations the 18th century, but this exercise seems to demonstrate more convincingly that **he** dislikes corporations and corporate speech, rather than proving that corporations have no protections under the First Amendment. *Id.* This is precisely what any judge should **not** do: substitute his own predilections for the law. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

To summarize the preceding points, corporations count as "persons" under a basic statutory analysis, under the Dictionary Act, and even under the rubbish that is RFRA. More importantly, our constitutional determinations in the free speech arena provide a

solid basis for deciding this case: The rights guaranteed by First Amendment are encompassing of individuals and associations of individuals. The language of the text excludes neither. Thus, Hobby Lobby and the Greens individually are all equally covered by the First Amendment's Free Exercise Clause, and they cannot be denied.

Framing the issue under *Smith:* "The obvious often escapes us"

Let us posit the central question of this case in terms *Smith:* May a person claim an exemption to a law of general applicability – in this case the Affordable Health Care Act – if the law conflicts with a person's religious beliefs?

In *Smith,* the rule is plainly stated: "An individual's religious beliefs do **not** excuse him from compliance with an otherwise valid law **prohibiting conduct** that the state is free to regulate." *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (Scalia, J., writing for the Court) (Emphasis added). And further, "The right of free exercise does **not** relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law **proscribes or prescribe conduct** that his religion prescribes or proscribes." *Id.* at 879 (emphasis added).

Some textual attention would be helpful here: First, "an otherwise valid law **prohibiting conduct**," i.e., a criminal law; next, "a valid and neutral law of general applicability … that … **proscribes conduct**," i.e., a criminal law. Quite obviously, in *Smith* we were dealing with a criminal law of general applicability, i.e., Oregon Controlled Substance law. But, as one American inventor is fond of saying, "The obvious often escapes us." William E. Murray, Split Flow Pumps (Patent No. 5,599,164), "Words of Wisdom," http://splitflowpumps.com/about/wisdom.htm

In the case at hand, we are obviously not dealing with a criminal law of general applicability, but a civil law, i.e., the Affordable Care Act. Further, the ADA does not proscribe conduct, but instead **mandates** conduct. Indeed, the ADA seeks to compel a vast array of human conduct far beyond the contraceptive mandate that is at issue here. The differences in the types of law at issue in *Smith* and in this case could not be more obvious. Hence, if the outcome of the analysis turns out differently, it should be no surprise.

Less than compelling interest? Or an interest beyond compelling?

At this juncture, some background is in order: The Patient Protection and Affordable Care Act of 2010 requires individuals to purchase a health insurance policy providing a minimum level of coverage; alternately, individuals may achieve the same result through employer-based coverage; or through Medicaid or Medicare. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2577 (2012) ("NFIB"). In addition to the individual mandate, the ACA also imposes an employer mandate, which requires employers with more than 50 employees to provide "minimum essential" health coverage to employees. 26 U.S.C. § 4980H. A required element of this coverage is women's "preventive care and screenings," which includes twenty FDA-approved contraceptive devices, methods or drugs. The employer plans must provide all of these contraceptives without cost-sharing, i.e., no co-pays. Among the twenty contraceptives, two are "emergency" contraceptive drugs known as "Plan B" and "Ella," which function by preventing the implantation of a fertilized egg. The two other mandated contraceptives are intrauterine devices (IUDs), which are also designed to prevent implantation of a

fertilized egg in the uterus. Brief for the Respondents at 3, *Sebelius v. Hobby Lobby* (No. 13-354). The Greens believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion. *Id.* at 9.

The portion of the Affordable Care Act that offends the Greens is but one small section of this gargantuan piece of legislation that includes many "novel, overlapping mandates and exemptions." *Id.* at 3. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. *NFIB,* 132 S. Ct. at 2580. Perhaps a better question regarding the ACA might be, what aspect of life doesn't it affect? In *NFIB,* this Court narrowly and lamentably rejected a challenge to the Act. Four of us on the Court, myself included, would have struck it down. As we said, "if Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, 'the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.'" The Federalist No. 33, p. 202 (C. Rossiter ed. 1961), quoted in *NFIB*, 132 S. Ct. at 2623. Unfortunately, by a judicial sleight of hand, the Court majority inappropriately applied the Taxing Clause to uphold this edifice. As a result, the "Sphinx of judicial arrogance" has built a pyramid that reaches to the stratosphere. *Dickerson v. United States,* 530 U.S. 428, 465 (2000) (Scalia, J., dissenting). The Affordable Care Act is a prescription to extend federal power to virtually all human activity under the sun. The question inevitably arises: Where does it stop?

Now, as the Government would have it, it is "compelling" that an employer must provide to employees virtually every available form of contraceptive – including

abortifacients – free of charge. The Government advances its compelling interests as (1) the protection of rights of Hobby Lobby's employees in a comprehensive insurance system; (2) the public health, and (3) equal access for women to health-care services. The majority opinion adequately addresses both the strengths and weaknesses of each of these interests. I therefore will not reiterate the analysis. Instead, I will focus on what the Government only tangentially advanced as a compelling interest: the Government's interest in a uniform, comprehensive plan. Brief of Petitioner at 45, *Sebelius v. Hobby Lobby* (No. 13-354). While discussing the employee's interests in the availability of a comprehensive health plan, the Government noted in passing our rule from precedent – "that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Although the Government lost on that point in *O Centro,* I am surprised the Government didn't press this point here, because there are, in fact, strong arguments to be made in this regard, particularly if we engage the *Smith* rationale.

In *Smith,* we held the "uniform application of Oregon's criminal prohibition is 'essential to accomplish' its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote." *Smith,* 494 U.S. at 905. Not only did this point carry significant weight in *Smith,* but the importance of a uniform, comprehensive plan is

also factored in our recent Commerce Clause jurisprudence. In that context, we held that the federal Controlled Substances Act (CSA) may validly be applied to prohibit an individual from cultivation, distribution, and possession of marijuana for personal, medicinal use. *Gonzales v. Raich*, 545 U.S. 1, 33 (2005). "The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce." *Id.* at 37 (Scalia, J., concurring).

Clearly, this Court gives substantial credence to state and congressional efforts to enact comprehensive and uniform legislation. Oregon's interest in its uniform controlled substance law was a central argument in that case, and it was an argument that I accepted. As a general rule, this Court gives great deference to what a legislature has chosen NOT to do, i.e., grant exemptions to neutral laws of general applicability. *Smith*, 494 U.S. at 906. Similarly here, the Government could have made a much stronger argument in its interest in its uniform, comprehensive health care program. A permissive regime of limitless exemptions could place the program on the proverbially "slippery slope," as Government points out. Brief for Petitioner, *supra*, at 45. Surprisingly, the Government does not make more hay of the issue, because this may have been its strongest argument.

The government's interest in a uniform, comprehensive plan falters, however, not because the interest is necessarily invalid, but because of the myriad of less restrictive alternatives and the substantial burden placed on the Greens, as the Court majority has detailed. Additionally, I would like to point out that the Government's "compelling interest" falls short even within our more deferential *Smith* standard. Imagine for a moment that the facts of that case were merged with the narrative of this one. Imagine

that Alfred Smith and Galen Black, instead of working as drug rehabilitation counselors, were the owners of a Native American arts and crafts enterprise known as Hobby Lobby. If instead of asking this Court for permission to use peyote in their religious ceremonies, they told us, "We are spiritual people; we value life; it is incompatible with our beliefs to supply abortifacients to our employees."

First of all, I am quite certain that dissenting justices here, enthralled as they are with diversity, multiculturalism and the latest cultural fads and trends, would automatically grant an exemption without question. *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting). End of story. It would, in fact, be a happy ending, because there is an actual legal basis to be found at the end of the rainbow. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 741 (1994) (Scalia, J., dissenting, "I have little doubt that Justice Souter would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies.")

Next, as I have noted, the controlled substance laws at issue in *Smith* and *Raich* are vastly different from the Affordable Care Act: One set of laws prohibits, the other grants; one set of laws aims at curtailing socially harmful conduct, the other mandates the provision of services – and further seems to encourage certain forms of sexual conduct. As we plainly said in *Smith:* "The government's ability to enforce generally applicable prohibitions of **socially harmful conduct,** like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 885 (emphasis added). Read between the lines, "socially harmful conduct," i.e., a criminal statute prohibiting the use of

dangerous drugs. That case dealt entirely with the collision of a generally applicable criminal statute and the respondents' alleged spiritual practice of ingesting peyote, a psychotropic drug. That is entirely not the case here. Hobby Lobby is not asking us to permit its Board of Directors to ingest psychedelic drugs to gain enlightenment, or the handing out of magic mushrooms to its employees to boost productivity. Rather, Hobby Lobby merely seeks permission to refrain from a requirement – providing certain contraceptives to its employees – based on a religious scruple. The essential factual differences could not be more clear: one set of Respondents asked for an exemption from a generally applicable criminal statute, and these Respondents merely seek a narrow exemption from one small portion of general **civil** legislation. Hobby Lobby does not ask us today to stamp their tickets for a magic carpet ride. Rather, the company is grounded – and wants to remain so – in its basic religious teachings, which do not include espousing the virtues of certain forms of contraception, or the handing out of abortifacients to its employees.

True, both categories of laws – the drug law and the ACA – aim at being uniform and comprehensive. But in comparison, the Controlled Substance Act seems like a modest proposal compared to the Affordable Care Act – the law of everything, the string theory of laws, if you will. If exemptions to this law were not available, what else would be left to free will in the course of human conduct?

And exemptions the Government has freely granted: Exemptions for religious employers, exemptions for nonprofits, exemptions for "grandfathered" health plans, exemptions here, exemptions there … except for for-profit enterprises like Hobby Lobby, despite the fact that its business practices are explicitly bound up with religious

principles. Brief for the Respondents, *supra,* at 8, *Sebelius v. Hobby Lobby* (No. 13-354). Based on the government's own estimates, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a, quoted in Brief for the Respondents, at 13. The Respondants argue rightfully that the plethora of exemptions destroys the Government's "compelling interest." *Id.* at 51.

The exemptions problem points to an even deeper, underlying problem with the Affordable Care Act: These exemptions were not specifically granted by Congress in the Act; instead Congress delegated exempting authority to the Health and Human Services Department. Thus, the HHS, pursuant to its regulatory authority, promulgates precisely what it claims this Court cannot do: "establish exemptions * * * with respect to any requirement to cover contraceptive services." *Id.* at 50, quoting 45 C.F.R. § 147.130(a)(iv)(A); 147.131(a).24. In other First Amendment contexts, we have specifically rejected this extent of administrative discretion. Free speech, for example, is far too important to place at the discretion of a municipal administrator: "Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review. *Thomas v. Chi. Park Dist.,* 534 U.S. 316, 323 (2002) (Scalia, J., writing for the Court). Similarly here, the Free Exercise of religion is far too important to place in the hands of an administrative functionary at the Health and Human Services Department. Our common law predecessors in England well understood the dangers of an overbearing administrative state, in which lower functionaries of the government are delegated too

much discretionary power. Providing the groundwork for our Fourth Amendment protection against unreasonable searches and seizures, Lord Camden traced the hierarchy of state functionaries who might seize warrant power, absent proper judicial oversight: "Lambert, Coke, Hawkins, Lord Hale – none of them take any notice of a Secretary of State being a conservator of the peace, and until of late days he was no more indeed than a mere clerk … At the time of making this statute, a justice of peace, constable, headborough, and other officers of the peace, borsholders and tithingmen, as well as Secretary of State, conservator of the peace and messenger in ordinary … certainly cannot be within [the statute], who is nothing more than a mere porter." *Entick v. Carrington,* 19 Howell, State Trials, 1029 (1765).

Delegating the protection our sacred liberties – whether religious liberty, freedom of speech, or the right to be secure in our persons – to the discretionary hands of administrative functionaries is beyond unwise. It is "an immense and frightening antidemocratic power, and it does not exist." *Dickerson v. United States,* 530 U.S. 428 (2000) (Scalia, J., dissenting). In this instance, if this Court were not to grant a religious exemption to the Greens, we would be abdicating our essential role as guardians of our constitutional liberties – and relinquishing them to the administrative state. This must not happen, and laws that attempt to effect this type of end-run around our constitution should not remain long on the books.

In better circumstances, we would strike down both RFRA and the AFA. Thankfully, this Court has chosen the next-best alternative by granting the Greens their modest sought-after exemption. Therefore, I concur with the judgment.

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