FREEDOM FROM RELIGION *foundation*

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June 20, 2019

The Honorable Bobby Scott
Chair
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member

Dear Chairman Scott and Ranking Member Foxx:

We are writing on behalf of the Freedom From Religion Foundation, a national nonprofit with 31,000 members across the country. FFRF protects the constitutional separation between state and church, and educates the public on nontheism.

Our colleagues are going to address some of the specific instances in which RFRA has been abused, so we opted to address that abuse from a wider perspective. We addressed some of the serious legal issues with RFRA in our *amicus* brief in the Hobby Lobby case, a copy of which is appended.[1] In particular, we want to ask a basic question about RFRA that has fallen by the wayside: Why?

The First Amendment and the U.S. Constitution already protect the free exercise of religion. They have for centuries. It's one of our nation's founding principles. So why do we need the Religious Freedom Restoration Act? Why do we need a law to protect that which is already so well protected under the Constitution? We don't.

Religious freedom guarantees the freedom to believe, but not necessarily the freedom to act on that belief. That is as it should be.

We recognize that drawing lines when it comes to government actions that regulate our behavior can be contentious, especially when that behavior is motivated by religion. But two things have long been understood in America.

First, the freedom to believe anything is absolute, but the freedom to act on those beliefs is not. In his letter to the Danbury Baptists, Thomas Jefferson put it like this: "the legitimate powers of government reach actions only, & not opinions."[2] To take the most obvious hypothetical: religion is not a license to murder, even if a person believes that their god is calling on them to kill others.[3] The law prohibiting

[1] Amicus Brief for FFRF, et al., 2014 WL 333897, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

[2] Jan. 1, 1802. *Available at* https://www.loc.gov/loc/lcib/9806/danpre.html.

[3] This is the example the Supreme Court used more than 150 years ago. Reynolds v. U.S., 98 U.S. 145, 166(1878) "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"

murder applies to everyone, regardless of their personal religious beliefs. The same is and should be true of other laws, including civil rights laws. Civil rights cannot be violated because of how someone else interprets the will of their god.

Second, the best protection for freedom ***of*** religion is a government that is free ***from*** religion. A secular government, one that respects and fights for the separation between state and church, is the best guarantor of genuine religious liberty. Without this separation, religious liberty is subject to the whims of the ruling majority's preferred religion, which can change over time.

These are the principles the U.S. Constitution lays out. Not every real-world clash of religiously motivated action and the law will be as obviously wrong as murder. Some questions will be harder. But, as a rule, the old legal adage—"Your right to swing your fist ends where my nose begins"—works if slightly amended: your right to exercise your religion ends where my rights begin.

Our Constitution draws the line where the rights of others begin. This means that neutral, generally applicable laws that incidentally burden someone's ability to exercise their religion are entirely permissible. In fact, these laws are necessary for the normal functioning of society. Government's chief purpose is to make and enforce such laws. We want the government to prohibit murder and enforce that prohibition, regardless of what the murderer's religion or god might say.

These two reasonable principles led to RFRA. which disregards them.
These principles are embodied in the case the Supreme Court decided in 1990, the case that launched RFRA, a law which disregards those two sacred principles.

Two Oregon drug counselors, Alfred Smith and Galen Black, used peyote as part of a native American religious ritual. One was a member of that sect, the other just visiting the ceremony. Both were fired. They got fired because drug counselors aren't allowed to use drugs, which is perfectly reasonable for states to ask of their drug counselors. This should not be controversial in the slightest.

Then, the men were denied unemployment benefits because they were fired for cause. Smith and Black were not fighting a criminal conviction. They were not fighting to get their jobs back. They were challenging the denial of unemployment benefits. They were arguing that not receiving unemployment benefits after being fired from their jobs as drug counselors for using drugs violated their free exercise of religion.

To draw a more mainstream analogy, this would be like a Christian losing his driver's license for speeding on the way to church every Sunday morning and arguing that this deprivation burdened his religion. Going to church does not give one a right to speed with impunity.

The Supreme Court did not see a religious liberty issue with saying that drug counselors cannot use drugs and expect to keep their jobs or collect unemployment, no matter what their religion says about drug use. In *Employment Division v. Smith* (1990) it upheld the denial of benefits because the law was not "prohibiting the exercise of religion," and the religious burden was "merely the incidental effect of a generally applicable and otherwise valid provision." General laws—that is, laws that don't specifically target religion, like blanket laws against drug use—that are neutrally applicable *can* burden someone's exercise of religion. In other words, "an individual's religious beliefs" cannot "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[4]

To sum up, the Court quoted *Reynolds v. U.S.* (1878), the decision that overturned Mormons' claim that their religion exempted them from prohibitions on polygamy. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[5]

This constitutional principle has withstood countless attacks from religious groups seeking special exemptions from our laws. In the 1960s, Maurice Bessinger refused to let a minister's wife enter his South Carolina barbeque joint because she was black. He believed he had "a constitutional right to refuse to serve members of the Negro race in his business establishments [and] that to do so would violate his sacred religious beliefs." No court, including the Supreme Court, accepted his argument that the Civil Rights Act was invalid because it "contravenes the will of God."[6]

Likewise, collecting taxes and using them for any purpose, including war, is permissible even if Quakers are pacifists. Child labor laws apply to all businesses, including those run by Christians. Amish employers still have to pay social security taxes, even if their religion is opposed to government support.

Religious hysteria exploded after the *Smith* decision, so Congress passed RFRA: a superstatute that effectively amends every other federal law. RFRA acts as a constitutional amendment without the hassle of going through that process.[7]

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[4] *Smith*, 494 U.S. 872, 878–79.

[5] *Reynolds*, 98 U.S. 145, 166–67.

[6] *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).

[7] *See* FFRF's *Burwell v. Hobby Lobby* amicus brief, *supra* n.1.

RFRA upended constitutional religious freedom. It goes too far and privileges religion.

RFRA did exactly what the Court feared in *Smith* and *Reynolds*, it elevated one individual's religious beliefs above the law. After the *Hobby Lobby* decision, individuals can even use their multi-billion dollar corporations to impose their religion on employees in spite of the law. This, incidentally, violates the first principle above: that religion can never excuse violating the rights of another citizen.

Some supporters of RFRA certainly had good intentions at its inception. But others saw a sinister potential in the law and have been working to use it in ways that may not have been intended, but which are required by the text of the law itself.

Their goal is to use RFRA to redefine religious freedom. To shifts the constitutional standard from one that protects belief to one that allows that belief to be imposed on others through actions. The result is that religiously motivated acts are exempted from our laws. RFRA supporters insist that it is not enough to be able to believe, they must be free to act on that belief no matter what the cost or impact on others.

The true impact of RFRA is simple: it privileges religion. It grants religion a special, favored status. It's the ultimate opt-out. But it also gives believers the ability to impose their religion on other citizens, as we saw with the *Hobby Lobby* case, and this includes the right to discriminate against other citizens. Those seeking to redefine religious freedom don't want protection, they want power.

RFRA does not protect religion. RFRA privileges religion.

Nearly 150 years ago, the Supreme Court asked if a citizen could avoid complying with laws "because of his religious belief." The resounding answer was "No." This would make "religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[8] In short, to allow religion to trump the civil law was to invite anarchy—or, if applied to favor only the majority's religion, theocracy.

But under RFRA, the law bows to sincerely held religious beliefs. It is time for that to change. RFRA should be repealed. Otherwise, it should be amended so to make it clear that RFRA cannot justify injuring another citizen or burdening the rights of that citizen.

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[8] *Reynolds*, 98 U.S. 145, 166–67.

No. 13-354

In The Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioner,
v.
HOBBY LOBBY STORES, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, BISHOPACCOUNTABILITY.ORG, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, THE CHILD PROTECTION PROJECT, THE FOUNDATION TO ABOLISH CHILD SEX ABUSE, SURVIVORS FOR JUSTICE, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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a ruling in this case that RFRA is unconstitutional is needed to more securely protect our nation's children.

SUMMARY OF ARGUMENT

This case is testimony to the extreme religious liberty rights accorded to believers by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (2012), at the expense of others. The intense passions about religious freedom and women's reproductive health in this case have obscured the issue that should be decided before this Court reaches the merits: RFRA is unconstitutional.

RFRA is Congress's overt attempt to takeover this Court's role in interpreting the Constitution. "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." *Boerne v. Flores*, 521 U.S. 507, 512 (1997). Accordingly, it "contradicts vital principles necessary to maintain separation of powers . . . ." *id.* at 536, and Article V. *Id.* at 529. RFRA also is beyond Congress's power, as an illegitimate exercise of power under the Commerce Clause.

RFRA also accords religious believers extreme religious liberty rights that yield a political and fiscal windfall in violation of the clearest commands of the Establishment Clause in a long line of cases. *Amici Curiae*, who are united in their concern that RFRA endangers the

vulnerable—who would otherwise be protected by the neutral, generally applicable laws of this country—respectfully ask this Court to hold that RFRA is unconstitutional once and for all, and to restore common sense to United States religious liberty guarantees.

ARGUMENT

This amicus brief makes an argument that has been lost in the intense public debate between claimed religious liberty for for-profit corporations and women's reproductive health: the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb , is unconstitutional.

The issue of RFRA's constitutionality has not been raised in this case, or the vast majority of other RFRA cases involving federal law, because the religious claimants do not challenge it, the federal government has chosen not to,[2] and courts

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[2] The Attorney General determines when to defend a federal statute and when not to. The default position is to defend acts of Congress, but this is not a hard and fast rule, and the Attorney General owes fealty to the Constitution, not Congress. Recently, Attorney General Eric Holder refused to defend the constitutionality of the Defense of Marriage Act, Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Rep. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html, in *United States v. Windsor*, 133 S.Ct. 2675, 2683 (2013). *Windsor*, 133 S.Ct at 2683. The issue was neither raised nor addressed in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005), which is

rarely take up the issue *sua sponte*. Thus, there have only been a few federal courts reaching the issue. *See, e.g., Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (holding RFRA as applied to Age Discrimination in Employment Act is constitutional as it did not violate the separation of powers principles nor the Establishment Clause, and was a proper exercise of Congressional power under the Commerce Clause, in response to Plaintiff minister invoking age discrimination claim and that RFRA was unconstitutional); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (holding RFRA constitutional as applied to federal law under Art. I powers, after the district court raised question of RFRA's constitutionality).

The decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), is a landmark, summary, and straight explanation of this Court's entire free exercise jurisprudence, in which this Court carefully considered and weighed the various possibilities and the most appropriate balance between history, doctrine, and the Court's experience over 100 years with free exercise cases. With a simple majority vote for RFRA ,[3] Congress shoved the Court aside

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this Court's only other RFRA case other than *Boerne v. Flores,* 521 U.S. 507 (1997).

[3] RFRA was not passed unanimously in either the House or Senate, despite its proponents' claims. It was passed in the House by a procedure euphemistically called "unanimous consent." 139 CONG. REC. H8713 (daily ed. Nov. 3, 2003).

and handed believers the most extreme religious liberty regime ever in place in the United States.

This Court correctly held in *Smith* that under the Free Exercise Clause, "the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to [free exercise] cases" involving neutral, generally applicable laws. *Id.* at 885. For the Court, the case was essentially a case of first impression in that it involved a demand for accommodation where the underlying religious conduct was illegal, which distinguished it from the *Sherbert v. Verner*, 374 U.S. 398 (1963), line of cases. Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, The Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1673 (2011). The result was that two drug counselors who were fired after using the illegal drug peyote, during Native American Church religious services, could not obtain unemployment compensation, because they had violated state law. The Free Exercise Clause did not provide immunity from the state law governing peyote or unemployment compensation. *Emp't Div. v. Smith*, 494 U.S. at 890.

This Court explained:

> [G]overnment'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. To make an individual's

> obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.

494 U.S. at 885 (internal quotation marks and citations omitted). Accordingly, strict scrutiny in the *Smith* case "would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability." *Boerne v. Flores*, 521 U.S. 507, 513 (1997.

Lobbyists for religious organizations and some civil rights groups responded to *Smith* with hyperbole and exaggeration, claiming that the Supreme Court had "abandoned" religious liberty. They mischaracterized the Court's previous holdings. Their representations to Congress that the First Amendment mandates exemptions from neutral, generally applicable laws also incorrectly portray the Framers' intent and the history of free exercise in the states. *See Boerne*, 521 U.S. at 541 (Scalia, J., concurring); *see also* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953 (2010) [hereinafter Hamilton, *Licentiousness*]; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Ellis West, *The Case Against a Right to*

Religion-Based Exemptions, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

This Court predicted in *Smith* that legislatures would be amenable to requests for accommodation. 494 U.S. at 890. The decision proved to be prescient: while the rhetoric on Capitol Hill furiously attacked this Court's interpretation of the First Amendment as the end of religious liberty, the federal government and the states where Native American Church members practice their religion enacted exemptions for the sacramental use of peyote.[4] This underscores how misguided the attack on *Smith* was.

The hearings before Congress were almost exclusively a litany of criticism against this Court and the *Smith* decision, accompanied by demands that Congress reverse this Court's reading of the First Amendment. As this Court stated, "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990)." *Boerne*, 521 U.S. at 512.

RFRA was enacted three years after *Smith* was decided. It handed religious claimants the constitutional standard that drug counselor Smith had demanded but that the Court had thoughtfully

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[4] *See, e.g.*, David Perry Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO L. REV. 65 (1991); Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 474-77 (2012).

rejected. The result was that religious entities obtained extreme rights to trump constitutional, neutral, generally applicable laws, in defiance of the Court's opinion.

In 1997, this Court, in a majority decision authored by Justice Kennedy, held that RFRA was unconstitutional in *Boerne v. Flores,* 521 U.S. 507 (1997), invoking several constitutional bedrock principles. First, RFRA is a violation of the separation of powers as a takeover of the Court's primary role as interpreter of the Constitution, *Boerne*, 521 U.S. at 519, 523–24. Second, it is beyond Congress's power. *Id.* at 536. Third, RFRA's enactment by simple majority vote circumvented the rigorous requirements under Article V to amend the Constitution. *Id.* at 529. These defects remain, even when RFRA is solely applicable to federal law, and this Court should invalidate RFRA once and for all.

To quote Gertrude Stein, "[a] rose is a rose is a rose." Gertrude Stein, *Sacred Emily*, Geography and Plays (1922). The plain language of RFRA makes the case that it is a shameless takeover of the Free Exercise Clause, constitutional doctrine, and "all . . . free exercise cases." 42 U.S.C. § 2000bb(b)(1) (2012). The very title of the law indicates that it is a "restoration" of something that previously existed. It invokes the "framers" for a standard they would not have adopted. *See* 42 U.S.C. § 2000bb(a)(1) (2012); *see also Boerne*, 521 U.S. at 541 (Scalia, J., concurring); Hamilton, *Licentiousness*, *supra*; Hamburger, *supra*; West, *supra*. It unabashedly states that the statute's

purpose is to "restore the compelling interest test as set forth in [the Supreme Court's First Amendment free exercise cases] *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) (2012).

In short, RFRA is "restoring" this Court's doctrine in cases where this Court had held it did not belong. *See also* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. J. 65, 119–20 (1996) (arguing that based on its "proclaimed purpose, RFRA violates the separation of powers doctrine . . . .").

RFRA plagiarizes this Court's doctrinal terminology and approach by choosing the Court's trigger for free exercise cases and a level of scrutiny from prior cases. It even replicates the burdens on the parties in free exercise cases:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> 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 (2012). This plain language establishes that Congress was aggrandizing its power by taking over this Court's power to interpret the Constitution. On its face, therefore, RFRA is not an ordinary statute, and is in violation of the separation of powers and Art. V. Moreover, the only class of beneficiaries for these extreme rights against constitutional laws is religious, which violates the Establishment Clause. No matter how much one pretends that RFRA is "just a statute," it is in fact an unconstitutional enactment.

I. RFRA Violates the Separation of Powers

There is nothing subtle about RFRA's encroachment on this Court's power. With RFRA, Congress selected the constitutional standards it prefers and required them to be applied in every circumstance where the Court has ruled it should not be applied. *See* Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6 (1995) (arguing that RFRA violates the separation of powers doctrine because "it undermines the most fundamental power held by any branch of government: the power to determine its own limitations.").

RFRA was and is a novel statute, which has not yet been replicated. For that reason alone, this Court should be wary. "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S.Ct. 3138, 3159 (2010)) (internal quotation marks omitted).

RFRA is Congress's attempt to concoct its own free exercise clause out of the Court's constitutional doctrine. This Court's terminology is Congress's terminology. The title alone says Congress is restoring a doctrine, not introducing anything new. RFRA lifts this Court's doctrinal language including "substantial burden" and "compelling interest."[5] And Congress "restores" its two favorite free exercise decisions, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). RFRA even replicates the burdens on the parties. 42 U.S.C. § 2000bb-1.

At the same time, Congress shopped among various other constitutional parameters. To these pre-existing free exercise doctrines, it added a new element for the benefit of religious believers. As

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[5] Congress borrowed free exercise doctrine up to the point it could hand religious lobbyists the maximum benefit, but was not even satisfied with that. It also added narrowly tailoring not yet seen in the Court's free exercise cases. .

this Court noted in *Boerne*, the "least restrictive means" test was not the test used in previous free exercise cases, *Boerne*, 521 U.S. at 535, even in *Sherbert* or *Yoder*, The concept of extremely narrow tailoring for strict scrutiny, however, is present in this Court's other constitutional cases invoking strict scrutiny, *e.g.*, under the Equal Protection Clause when a law includes a race-based distinction. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

Then Congress ordered the federal courts to apply this new package of free exercise rights to the very laws this Court had held should not receive the benefit of strict scrutiny: neutral, generally applicable laws. *Boerne*, 521 U.S. at 515; *Smith*, 494 U.S. at 879.

RFRA's legislative history supports reading it as a takeover of this Court's power to interpret the Constitution, as it focuses nearly exclusively on members of Congress and testimony castigating the Supreme Court for its First Amendment interpretation in *Smith*. To say that RFRA is not in fact an attempt to overrule this Court's constitutional interpretation is to engage in high-level intellectual gymnastics divorced from its text, history, and fundamental common sense.

If it were constitutional, RFRA is a formula that would make it possible for Congress to meddle with any constitutional doctrine and decision, and move the Court to the sidelines as political winds shift constitutional standards by simple majority votes. *See* Christopher L. Eisgruber & Lawrence G.

Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469-70 (1994) (arguing that RFRA is unconstitutional because it violates principles of religious freedom, it exceeds Congress' authority, and it is an "assault upon the judiciary's interpretive autonomy."). It ignores this Court's long experience in crafting and considering the proper balance of rights. Before RFRA, this Court's role was to engage in ongoing oversight and consideration of how each constitutional rule operates through the decades and centuries most effectively to achieve the Constitution's multiple ends. If Congress can unilaterally insert its preferred standards whenever politically pressured to do so, this Court's role has been preempted. *See* Aurora R. Bearse, Note, *RFRA: Is it Necessary? Is it Proper?*, 50 RUTGERS L. REV. 1045, 1066 (1998); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998).

As this Court stated in *Boerne*, "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

II. RFRA Violates Article V

Article V imposes extraordinary limits on amendments to the Constitution, resulting in only 27 amendments over the course of 225 years:

> The Congress, whenever two thirds of both Houses shall deem it necessary,

> shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. U.S. Const. art. V.

The Framers chose this complicated and difficult route to ensure stability and maintenance of the separation of powers. *See* Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1447 (1998). *Cf.* William Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292–303 (1996), cited in *Boerne*, 521 U.S. at 529.

This Court in *Boerne* explained the separation of powers defects under the umbrella of Congress's power under the Fourteenth Amendment, by reasoning first from this Court's role vis-à-vis the Bill of Rights regarding the "traditional separation of power between Congress and the Judiciary," stating that, "[t]he first eight Amendments to the Constitution set forth self-executing prohibitions on government action, and this Court has had primary authority to interpret those prohibitions." *Boerne*, 521 U.S. at 524. The Court considered the argument that Sec. 5 of the Fourteenth Amendment was intended to invest Congress with a new power to create constitutional rights against the states—with the understanding that they could *not* be created against the federal government. While the history of the Fourteenth Amendment supports that Congress may enforce constitutional rights against the states, even in a prophylactic manner, the Court concluded that under the Fourteenth Amendment, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Boerne*, 521 U.S. at 524. This Court's cases further confirmed that even Sec. 5 of the Fourteenth Amendment had not "endowed Congress with the power to establish the meaning of constitutional provisions." *Id.* at 527. With RFRA , Congress unilaterally usurped that authority: RFRA "appears . . . to attempt a substantive change in constitutional protections." *Id.* at 532. *See also*, *id*. at 534.

Accordingly, when the courts apply RFRA, the primary doctrine comes from the Court's constitutional free exercise cases, as the parties in

this case have urged this Court to do. "Given this restorative purpose, Congress expected courts considering RFRA claims to 'look to free exercise cases decided prior to *Smith* for guidance.' S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); See H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same)." Br. of Petitioner Kathleen Sebelius, Secretary of Health and Human Services, et al., Jan. 10, 2014, at 16. Br. for Respondents at 23–28, *Sebelius v. Hobby Lobby Stores, Inc.*, 133 S.Ct. 641 (2012) (No. 13-354); Br. for Petitioners at 17–19, *Conestoga Wood Specialities Corp. v. Sebelius*, (No. 13-356), 2014 WL 173487. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1131–32 (10th Cir. 2013) (en banc); *Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419, at *2–3 (3d Cir. Feb. 8, 2013).

RFRA 's defenders say that RFRA is "just a statute" that is different from a constitutional amendment. Yet, everything passed by Congress is "just a statute." It is a meaningless truism to say that just because a law passes through Congress and is signed by the President, it is a statute. Some statutes are aggrandizements of Congress's power, or fail to follow required procedures, and, therefore, are unconstitutional statutes. *E.g., Clinton v. City of New York,* 524 U.S. 417 (1998) (holding Line Item Veto Act unconstitutional); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 21, 211 (1995) (holding § 27A(b) of the 1934 Act unconstitutional because it would require federal courts to reopen final judgments entered before the provision was enacted); *Metro. Washington Airports Auth. v.*

Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 253 (1991) (holding that congressional delegation of veto power to review board composed of congressmen unconstitutional); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding unconstitutional a section of the Immigration and Nationality Act authorizing a one-house resolution to invalidate Executive Branch decision to allow deportable alien to remain in the country); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Comptroller General, as congressional agent, may not exercise executive functions). That describes RFRA.

III. RFRA Is Not a Valid Exercise of Congressional Power

Article I grants no federal enumerated power to Congress that justifies RFRA as applied to federal law. It is in fact, simply, an enactment by simple majority vote of constitutional doctrines that Congress prefers. There is no enumerated power over religious liberty. The only conceivable theory to support its application to federal law is the Commerce Clause, and it is an illegitimate law under this Court's Commerce Clause jurisprudence.

The Commerce Clause cannot be used to regulate that which is noneconomic. RFRA is nothing other than a constitutional standard of review, which means it is solely aimed at laws. That is what constitutional standards of review measure. Yet, the law is by its nature noneconomic.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a legitimate exercise power under the Commerce Clause requires a direct and substantial effect on commerce, and that to uphold the Gun-Free School Zones Act in that case, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.[6] *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2646 (2012) (Scalia, J., dissenting) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants."); *Sebelius*, 132 S.Ct. 2566, 2586-87 (2012). To conclude that RFRA is a direct regulation of commerce with a substantial effect on commerce, this Court would have to "pile inference upon inference."

RFRA does not directly regulate any activity in commerce itself, but rather the law, which is noneconomic in nature. To be sure, religious entities have tried to undergird Congress's power to enact RFRA by arguing that religious entities otherwise operate in commerce. "But if every person comes within the Commerce Clause power

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[6] In *Lopez*, the Court also held that the Gun-Free School Zones Act was unconstitutional in part because Congress did not consider its authority under the Commerce Clause. 514 U.S. at 562-63. The same is true of RFRA.

of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." 132 S.Ct. at 2648.

Under similar reasoning, the private right of action in the Violence Against Women Act was held as beyond Congress's power under the Commerce Clause, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). *See also Reno v. Condon*, 528 U.S. 141, 142 (2000); *cf. Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (finding law valid under the Commerce Clause where it "directly regulates economic commercial activity"). *See also* Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2382 (2004).

RFRA 's novel tack of usurping this Court's constitutional doctrine as the substance of an ordinary statute is unconstitutional as against the states because it is beyond Congress's power, see *Boerne*, and unconstitutional when applied to federal law, because the Commerce Clause does not

justify regulation of the law *per se*, which is noneconomic in nature.[7]

IV. RFRA Violates the Establishment Clause

Defenders of RFRA say it cannot be unconstitutional on the theory that Congress can carve up its laws however it sees fit. After all, Congress's own efforts are scaled back by this self-imposed law. This is, in fact, an incomplete description of the necessary issues to be considered under the Religion Clauses.

The Establishment Clause prevents Congress from favoring religious individuals or entities. It is after all, "[t]he clearest command of the Establishment Clause. . . that one religious

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[7] Nor could RFRA be constitutional under Congress's spending or taxing powers. Such a preference for religious believers to overcome neutral, generally applicable fiscal or tax laws would be an extraordinary financial benefit designed solely for religious actors, and a patent violation of the Establishment Clause, as discussed in the next section. RLUIPA's prison provisions have been upheld under the Spending Clause, but RLUIPA regulates states and local governments, not individuals, and the relevant funding flows to prisons, not religious persons. *See Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009), *aff'd*, 131 S.Ct. 1651 (2011); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006); *Benning v. Georgia*, 391 F.3d 1299, 1306–07 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606–09 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002).

denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). This command is particularly strong when financial benefit is at stake. *See also Mitchell v. Helms,* 530 U.S. 793, 809 (Thomas, J., plurality) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Court has consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."); *Lee v. Weisman*, 505 U.S. 577 (1992); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). RFRA carves up every neutral, generally applicable federal law (i.e., those that are constitutional under the Free Exercise Clause) for the benefit solely of religious actors and it does so by granting extreme rights against otherwise constitutional statutes. This violates the Establishment Clause.[8]

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[8] Even if this Court did not invalidate RFRA under the Establishment Clause on its face, it is undoubtedly unconstitutional as a violation of the separation of church and state in many applications. *See, e.g.,* Br. for Church-State Scholars Frederick Mark Gedicks, et al. as Amicus Curiae Supporting Petitioner, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354. *See also* Sara Brucker, Navajo Nation v. United States Forest Service*: Defining the Scope of Native American Freedom,* 31 ENVIRONS ENVTL. L. & POL'Y J. 273, 292 (2008). The same can be said about RLUIPA. See, e.g., Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized*

This Court has explained how extreme RFRA 's "stringent test," *Boerne*, 521 U.S. at 533, is as applied to state law, and the principle is no different when applied to federal law:

> The stringent test RFRA demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If compelling interest really means what it says, many laws will not meet the test. The test would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the

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Persons Act of 2000: Unconstitutional and Unnecessary, 10 WM. & MARY BILL RTS. J. 189, 189 (2001).

> position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

Boerne, 521 U.S. at 533–34 (citations omitted) (internal quotation marks omitted).

Imposing this gauntlet on every federal law forces the needs of other believers and nonbelievers to be subservient to the believers invoking RFRA. For example, the women in Hobby Lobby's employ were hired under the protection of Title VII's prohibition against religious discrimination, 42 U.S.C. § 2000e-2(a)(1) (2012). Therefore, Hobby Lobby cannot mandate that its employees share its owners' religious beliefs, and, in this religiously diverse society, many female employees likely will have their own, different beliefs. These women cannot, under the Tenth Circuit's reasoning and Hobby Lobby's invocation of RFRA, get coverage of widely accepted medical care consistent with their own religious beliefs, because of their employer's beliefs. That is an undue preference for one religion over another, which this Court's cases have long forbidden. *See* Ruth Colker, *City of Boerne Revisited*, 70 U. CIN. L. REV. 455, 465, 473 (2002) (arguing that the Court could have decided *City of Boerne* by ruling that RFRA violated the Establishment Clause because the compelling interest standard "pose[d] the problem of possibly providing undue preferential treatment to religious entities without balancing other interests . . . .[,]" and thus, the RLUIPA is also "unconstitutional not because it violates City of Boerne's proportionality and congruence test, but because it violates the

Establishment Clause in its attempt to protect religious freedom."). *See generally* Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 230 (2006) (arguing that the RLUIPA, as applied to auxiliary use claims, may violate the Establishment Clause because it "favor[s] religion over irreligion.").

RFRA is being invoked in this case as a license for employers to influence their female employees' contraception choices, but, because of the way that RFRA operates, this case actually represents just the tip of the iceberg. As Justice Kennedy has noted, the test in RFRA creates the potential for required religious exemptions from civil obligations of almost every conceivable kind. *Boerne*, 521 U.S. at 533-34. For example, the contraception mandate at issue in this case is just one element of a list of preventive requirements for health plans, which also includes certain immunizations; "evidence-informed preventive care and screenings" for infants, children, and adolescents; and domestic violence screening and counseling, among others. 42 U.S.C. § 300gg-13 (2012). If Hobby Lobby can deploy RFRA to block coverage of women's reproductive health, the next believer will argue against vaccinations, and the next against screenings for children or domestic violence screening and counseling. There is no limit to the variety of religious believers in the United States, and good reason to know that the vulnerable will pay the price. It is no answer to say that protection of the vulnerable always serves a

"compelling interest," as the "least restrictive means" analysis tilts the balance away from all those protected by the law and toward the religious claimant determined to overcome the law.

The RFRA preference is not only a matter of believers obtaining a political advantage over public policy issues. RFRA also rewards believers with financial benefits. For example, it permits for-profit businesses like Hobby Lobby and Conestoga Wood to carve up neutral, generally applicable laws to their financial benefit, and to the financial detriment of other arts and crafts and cabinet stores of other faiths or no faith, favoring some believers in a way that this Court's precedents have never allowed. This Court has never allowed the government to pick and choose who receives financial benefits according to belief (or lack thereof). *Zelman v. Simmons-Harris,* 536 U.S. 639, 662-63 (2002) (upholding voucher system only because it covered all schools, religious and non-religious); *Texas Monthly, Inc.*, 489 U.S. at 2 (holding unconstitutional tax exemption only applicable to religious publications); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding statute authorizing one-minute period of silence in all public schools for "meditation or voluntary prayer" violates the First Amendment because it was entirely motivated by a purpose of advancing religion); *Estate of Thornton v. Caldor, Inv.*, 472 U.S. 703 (1985) (holding statute unconstitutional because it imposed an absolute duty on employers and employees to conform their business practices to the practices of one particular religion); *Larkin*, 459 U.S. at 116 (state statute granting churches

and schools the power to reject liquor license applications for locations within 500-foot radius of the church or school violates the Establishment Clause); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) (upholding bus service to religious schools, in addition to public schools, because it was available to all students). *See also Mitchell,* 530 U.S. at 840 (2000) (O'Connor J., concurring), quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 847, (1995) (O'Connor, J. concurring) ("Although '[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'"); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (holding that a statute creating separate school district for religious enclave violated the Establishment Clause).[9]

Moreover, federal law then rewards believers who prevail under RFRA with attorneys' fees, which means that taxpayers pay for believers to demand a personal accommodation that is not constitutionally required. 42 U.S.C. § 1988 (2012). Therefore, taxpayers are paying for believers' litigation in circumstances where the Constitution

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[9] RFRA also creates perverse profit incentives for for-profit businesses to claim religious rights. Were Hobby Lobby to prevail in this case, it would be able to drive its overhead costs down, which would permit it to push prices down, and therefore trump other arts and crafts stores in the marketplace.

does not require the accommodation. That is a novel, and truly stunning benefit to be accorded to believers alone. If taxpayer standing ever were justified, this is the law that would justify it. *Flast v. Cohen*, 392 U.S. 83 (1968). The Establishment Clause violation is straightforward: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

The financial imbalance between religious believers and other citizens is even more extreme than it might seem at first blush, because RFRA lets religious citizens rewrite any federal law they don't like, to their benefit. RFRA forces other citizens to enter a second round, this time in federal court, to pursue their policy convictions. Believers, like all citizens, can ask Congress for exemptions, *see Smith*, 494 U.S. at 879-80, but if an exemption is denied through duly enacted legislation, RFRA invites the believer into the judicial system to trump the duly enacted public policy. After having fought in the political process, the objecting taxpayers must then expend their own funds in federal litigation to protect the law that was passed, assuming they can intervene or obtain taxpayer standing, and they must do so under a standard that places a heavy thumb on the side of the balance of the religious believer. In short, religious believers are getting two bites at the public policy apple.

In sum, RFRA 's invalidation of constitutional laws to the benefit solely of religious

actors, is a patent preference for believers, which violates long-settled and critically important principles under the First Amendment's Establishment Clause.

CONCLUSION

The Religious Freedom Restoration Act was held unconstitutional in *Boerne v. Flores*, 507 U.S. 521 (1997), as a violation of separation of powers, federalism, and Art. V procedures. Under pressure from religious lobbyists and intent on trumping this Court's constitutional free exercise doctrine, Congress ignored much of the *Boerne* reasoning, and re-enacted RFRA following *Boerne* as a law that only applies to every federal law. Its constitutionality has not been widely considered, because the religious claimants do not raise it, the Attorney General has chosen not to, and courts have not raised it *sua sponte*. The result is that this novel federal statute, which is one of the most aggressive attacks on this Court's role in constitutional interpretation in history, has fomented culture wars in the courts like the one ignited by for-profit employers in this case.

RFRA violates the separation of powers and Article V, exceeds Congress's enumerated powers, and violates the Establishment Clause. Accordingly, *Amici Curiae* respectfully request this Court address its constitutionality and hold RFRA unconstitutional.