Nos. 23-235, 23-236

# In the Supreme Court of the United States

FOOD AND DRUG ADMINISTRATION, ET AL.,
*Petitioners*,
v.
ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
*Respondents*,

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DANCO LABORATORIES, L.L.C.,
*Petitioner*,
v.
ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
*Respondents*.

**On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF *AMICI CURIAE* WORLD FAITH FOUNDATION AND INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF RESPONDENTS


Tami Fitzgerald
The Institute for Faith And Family
9650 Strickland Road, Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

James L. Hirsen
*Counsel of Record*
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

*Counsel for Amici Curiae*



Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* respectfully urge this Court to affirm the decision of the Fifth Circuit.

World Faith Foundation is a California non-profit, tax-exempt corporation formed to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the rights to life, religion, and conscience. See https://iffnc.com.

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees liberty of religion and conscience. Liberty extends beyond individuals to associations like the Respondent Alliance for Hippocratic Medicine. These associations consist of medical professionals who wish to practice medicine with integrity, consistent with conscience, ethics, and religious faith. Not everyone shares those values but cutting out conscience is a frightening prospect for patients, doctors, and other medical personnel. This is particularly true following the Supreme Court's decision returning abortion regulation to the states. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022).

But now, in a brazen end-run around the recent *Dobbs* decision, the FDA has inexplicably loosened important safety measures designed to protect women against the dangers of chemical abortion. The FDA's deregulation of chemical abortion forces doctors to participate in elective abortions. Emergency room physicians must often respond to the harmful complications created by chemical abortions. These consequences are foreseeable—indeed, inevitable.

America's historical respect for conscience is illustrated by exemptions granting relief from the moral dilemma created by mandatory military service. This Court, acknowledging man's "duty to a moral power higher than the State," once quoted the profound

statement of Harlan Fiske Stone (later Chief Justice) that "both morals and sound policy require that the state should not violate the conscience of the individual." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Indeed, "nothing short of the self-preservation of the state should warrant its violation," and even then it is questionable "whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." *Id*. It is hazardous for any government to crush the conscience of its citizens.

"All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state." *Seeger*, 380 U.S. at 170, quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. at 269. The FDA's actions attack this time-honored liberty that Americans have treasured for over 200 years—liberty no one can be required to sacrifice as a condition for participating in public life. Coerced participation in abortion is anathema to the basic First Amendment principle that the government may not coerce its citizens to endorse or support a cause. The injury here is particularly insidious, forcing conscientious physicians to personally perform a morally objectionable procedure that collides with their commitment to preserve life.

## I. THE FDA'S DEREGULATION OF CHEMICAL ABORTION CAUSES INJURIES TO CONSCIENCE SUFFICIENT FOR LEGAL STANDING UNDER ARTICLE III.

Standing is a threshold issue that must be resolved prior to ruling on the merits. *Amici* write to address the critical underlying issue of conscience and explain its importance and sufficiency for legal standing. Emergency room physicians are often forced to respond to the harmful complications created by chemical abortions. The FDA's deregulation of chemical abortion "put[s] them in a position where they must perform or complete an abortion even though doing so is contrary to their moral beliefs." *All. for Hippocratic Med. v. United States Food & Drug Admin.*, 78 F.4th 210, 232 (5th Cir. 2023) ("*AHM v. FDA*"). As one doctor phrased it, "the FDA's actions may force me to end the life of a human being in the womb for no medical reason." *Ibid.* These consequences are foreseeable—indeed, inevitable. The injuries to conscience are imminent, legally cognizable, caused by the FDA's actions, and lack a legal remedy.

### A. The injury to conscience is imminent.

The obligation imposed on objecting physicians poses a "substantial risk" of impending future harm to conscience. *AHM v. FDA*, 78 F.4th at 227; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

The evidence of prior injury cited by the Fifth Circuit is "especially probative." *AHM v. FDA*, 78 F.4th at 228; *Crawford v. Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371, 376 (5th Cir. 2021) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury"). Based on the testimony of "multiple doctors" being required to participate in a failed chemical abortion, future injury to conscience is virtually certain. *AHM v. FDA*, 78 F.4th at 232. As one doctor declared, severe injury to conscience occurred when his partner was forced to the complete the abortion of a child with a heartbeat:

> Due to the amount of bleeding . . . my partner had no choice but to perform an emergency D&C. . . . And because *the preborn baby still had a heartbeat* when the patient presented, my partner felt as though she was forced to participate in something that she did not want to be a part of—completing the abortion.

*Id.* at 236, citing Dr. Francis Declaration ¶ 13 (emphasis added).

The FDA defended itself by arguing the doctors could decline to participate in abortion based on certain federal statutes (42 U.S.C. §§ 238n, 300a-7(c), (d)). *Id.* at 236. But the statutory protection is precarious because "the federal government has recently taken a contrary position" (*id.*), contending that "when pregnant women come to a Medicare-funded hospital with an emergency medical condition, [federal law] obligates the treating physician to provide stabilizing

treatment, including abortion care." *United States v. Idaho*, 623 F. Supp. 3d 1096, 1109 (D. Idaho 2022);[2] *see* Reinforcement of EMTALA[3] Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss, at 6, Centers for Medicare & Medicaid Services (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf. The government also averted the issue by arguing that the obligation runs only to hospitals and not to individual doctors, but that would be cold comfort to a small clinic with no available doctor willing to perform abortions. *AHM v. FDA*, 78 F.4th at 236. The Fifth Circuit rightly concluded that the federal laws cited by the government "do not alleviate the Doctors' conscience injury." *Id.* at 237.

### B. The injury to conscience is legally cognizable.

Besides being sufficiently imminent, the threatened injuries are legally cognizable. *AHM v. FDA*, 78 F.4th at 235; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-07 (2021). The Fifth Circuit correctly concluded that the doctors "face a concrete injury when they are forced to choose between following their conscience and providing care to a woman experiencing complications"

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[2] On January 5, 2024, this Court granted the Petition for Writ of Certiorari in *Idaho v. United States*, Docket No. 23-727. The question presented is "whether EMTALA preempts state laws that protect human life and prohibit abortions, like Idaho's Defense of Life Act."

[3] 42 U.S.C.S. § 1395dd (Emergency Medical Treatment & Labor Act).

resulting from an attempted chemical abortion. *AHM v. FDA*, 78 F.4th at 236.

As this Court has previously instructed, we must look to "history and tradition" as a "meaningful guide" to determine whether a case is sufficiently "concrete" to meet the standards for Article III standing. *AHM v. FDA*, 78 F.4th at 257 (Ho, J., concurring), citing *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023) (quoting *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 274 (2008)). Concreteness is assessed by considering whether the alleged harm has a "close relationship" to harms traditionally recognized by American or English courts, including "various intangible harms." *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2200. Although "tangible injuries are perhaps easier to recognize," many cases have acknowledged intangible injuries as sufficiently concrete to qualify for standing, including basic constitutional liberties. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (religion). The freedom to follow conscience is a similar intangible harm that qualifies for Article III standing.

The burden on conscience is heavy. It is even more personally intrusive and substantial than the contraception mandate in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). If the law protects a *corporation* from having to *pay for* religiously objectionable drugs, then surely it protects a *natural person* (a doctor) from having to *personally "perform* or complete an abortion" or related treatment that "conflicts with sincerely held

moral beliefs and violates their rights of conscience." *AHM v. FDA*, 78 F.4th at 228-229 (emphasis added).

### C. The injury to conscience is caused by the FDA's actions.

In some cases, there is a "difficult moral question" about "where to draw the line in a chain of causation that leads to objectionable conduct," and courts "cannot override the sincere religious beliefs of an objecting party on that question." *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2391 (2020) (Alito, J., concurring); see *Hobby Lobby*, 573 U.S. at 723-726; *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715-716 (1981). Here, there are no such difficulties. The doctor does not merely participate in a "chain of causation." The FDA's revised rules demand personal participation—a doctor "must provide" an abortion in response to a specifically defined emergency medical condition.

The Fifth Circuit carefully explained that the doctors "have proven up each link in the chain of causation," including the statistical certainty that many "women who take mifepristone will suffer serious medical complications," that hundreds of doctors will treat patients under these circumstances (and many already have), and finally, "that providing such treatment causes the Doctors to violate their rights of conscience" and suffer other serious consequences. *AHM v. FDA*, 78 F.4th at 234.

### D. There is no legal remedy for the irreparable harm caused by injuries to conscience.

The physicians litigating this case "face a substantial risk of irreparable harm" to conscience. *AHM v. FDA*, 78 F.4th at 253. "No legal remedy can adequately redress [their] conscience and mental-distress injuries." *Id.* at 252. Besides the harm to the doctors themselves, "money damages [cannot] remedy the destruction of life." *Id.* at 266 (Ho, J., concurring). The doctors uphold the "national policy of discountenancing abortion as inimical to the national life." *Id.*, quoting *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915). Moreover, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment).

## II. CONSCIENCE IS AN "INTERNAL MORAL JUDGE" THAT FEATURES BOTH BELIEF AND ACTION.

Liberty of conscience has deep roots in American history. "Conscience is the essence of a moral person's identity. . . . Liberty of conscience was the foundation for Madison's and Jefferson's and other Framers' views underlying the First Amendment's religion clauses." *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of Petition for Rehearing En Banc.) Our first commander in chief cautioned that "[w]hile we are contending for our own liberty, we should be very cautious of violating the

rights of conscience in others." Letter from George Washington to Colonel Benedict Arnold (Sept. 14, 1775), *in* THE PAPERS OF GEORGE WASHINGTON, 1 REVOLUTIONARY WAR SERIES 455-56 (1985).

But despite this longevity in American law, "[c]reating a workable definition of conscience is as daunting as defining religion." Lucien J. Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253, 266-267 (2017). This Court noted the difficulty in distinguishing between religion and conscience, stating that "in no field of human endeavor has the tool of language proved so inadequate." *Seeger*, 380 U.S. at 174-75.

Dictionaries offer general guidance. Webster's New World Dictionary 296 (1988) defines conscience as "a knowledge or sense of right and wrong, with an urge to do right … [and] feelings of guilt if one violates [an ethical] principle." Black's Law Dictionary (7th ed. 1999) defines conscience as follows: "1. The moral sense of right or wrong, especially a moral sense applied to one's own judgment and actions; 2. In law, the moral rule that requires justice and honest dealings between people."

John Locke defined conscience as an "internal moral judge" based on moral beliefs that may or may not be religious. Nathan S. Chapman, Disentangling Conscience and Religion, 2013 U. Ill. L. Rev. 1457, 1489; Jared B. Magnuson, *Let Your Conscience Be Your Guide: Comparing and Contrasting Washington's Death With Dignity Act and Pharmacy Regulations After the Ninth Circuit's Decision in* Stormans, Inc. v. Wiseman, 52 Ga. L. Rev. 613, 623 (Winter 2018). Many

deeply religious persons view abortion as a grave moral wrong. In the health care context, doctors and other professionals raise conscientious objector claims when faced with a government mandate to "engage in particular kinds of behavior," such as abortion, "understood as sinful by his or her religion." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 564 (2006). Conscience may register as "private reason" rather than "public reason," which may be hostile to individual conscience. Brett G. Scharffs, *Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 B.Y.U.L. Rev. 957, 980. But conscientious objectors should not be viewed as "a law unto themselves because they are still subject to a higher law." O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 585.

Belief and action are the "two predominant features" of conscience. Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253 at 266. Conscience "involves more than mere belief: it entails acting - living - in accordance with central convictions." Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience*?, 76 U. Colo. L. Rev. 911, 923 (2005). Here, belief that abortion is morally wrong leads a conscientious physician to decline participation in the procedure. "A disconnection between beliefs and decisions, . . . whether compelled or voluntarily, generates guilt, regret, shame, and a feeling of loss of personal integrity." Dhooge, *The*

*Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y at 267.

Courts and legislatures, both federal and state, face the challenge of not only defining conscience but formulating a means to assess it and craft appropriate legal protection. Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y at 270. This is indeed a daunting task. Idaho, Louisiana, and Mississippi define conscience in terms of certain principles sincerely held by any person. Idaho Code Ann. §18-611(b) ("religious, moral, or ethical principles"); (La. Rev. Stat. Ann. §§40:1061.20(A)(1), (B)(1) (a "sincerely held religious belief or moral conviction"); Miss. Code Ann. §41-107-3(h) ("religious, moral, or ethical principles"). Illinois and Pennsylvania expressly reference religious beliefs but also protect comparable moral convictions that are not religiously grounded. 745 Ill. Comp. Stat. 70/3(e); 18 Pa. Cons. Stat. §§3202(d), 3203. Other states have statutory conscience protections related to health care issues, including vaccinations, health care directives, and living wills, but do not define "conscience." *See* Ariz. Rev. Stat. Ann. § 36-3205(C)(1); Ark. Code Ann. § 20-6-109(b); Conn. Gen. Stat. § 19a-131e(b); Fla. Stat. § 381.00315(1)(c)(4); N.M. Stat. Ann.§§12-10A-13(D)(3), 24-7A-7(E); R.I. Gen. Laws § 23-8-4; S.C. Code Ann. § 44-4-520(A)(3); Tenn. Code Ann. §§32-11-108(a), 68-11-1808(d)(1); Tex. Educ. Code Ann.§§38.001(c)(1)(B), 51.933(d)(1)(B); 12 Va. Admin. Code § 30-20-240(5). Definitions vary widely but are generally based on individual moral convictions about belief and action.

## III. RESPECT FOR INDIVIDUAL CONSCIENCE IS DEEPLY ROOTED IN AMERICAN LAW AND HISTORY.

The initial draft of the First Amendment, sent by the House of Representatives to the Senate, included a "Conscience Clause" in addition to the now familiar Free Exercise and Establishment Clauses. Zachary R. Carstens, *The Right to Conscience vs. The Right to Die: Physician-Assisted Suicide, Catholic Hospitals, and the Rising Threat to Institutional Free Exercise in Healthcare*, 48 Pepp. L. Rev. 175, 179 n. 9 (2021), citing S. JOURNAL, 1ST CONGRESS, 1ST SESS. 63 (1789) (emphasis added). Madison's proposed addition to the text read as follows:

> That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, *nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.*

*Ibid* (emphasis added), citing 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834). Madison considered individual conscience "the most sacred of all property." James Madison, *Political Essay: Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* SELECTED WRITINGS OF JAMES MADISON 223 (Ralph Ketcham ed. 2006).

In health care, there is a long history of respect for the conscience and moral autonomy of both patients and professionals. Regardless of the rights of women,

demanding that a physician act in a "morally unpalatable manner . . . compromises the physician's ethical integrity" and likely has "a corrosive effect upon [his or her] dedication and zeal" in treating patients. J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002). Conscientious objector claims are "very close to the core of religious liberty" and "present less danger to the community" than civil disobedience. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 565.

After abortion was constitutionalized[4] in *Roe v. Wade*, 410 U.S. 113 (1973), "conscience clauses began to emerge" in the field of health care. Magnuson, *Let Your Conscience Be Your Guide*, 52 Ga. L. Rev. at 624. Congress acted swiftly to preserve the conscience rights of professionals who objected to participating in the procedure. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that: "Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). Soon thereafter, Congress passed the Hyde Amendment, prohibiting the use of federal funds to perform abortions except in cases of incest, rape, or danger to the mother's life. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 627-628. Congress passed the Coats-Snowe Amendment in 1996 (42 U.S.C. § 238n), "shield[ing] conscientious medical students and healthcare entities from mandatory abortion training." Carstens, *The*

[4] Since abortion was a matter for the states and was already legal in some, it is more accurate to say that it was *constitutionalized* rather than *legalized*.

*Right to Conscience vs. The Right to Die*, 48 Pepp. L. Rev. at 181. Other protections include the Medicare and Medicaid Conscience Clause Provisions, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (managed care providers exempted from covering counseling or referral for procedures that violate their moral or religious views). These federal protections testify to America's time-honored respect for conscience.

### A. States provide broad protection for liberty of conscience through constitutions, statutes, and judicial rulings.

After the Church Amendment, "the majority of states followed suit within the next few years." Magnuson, *Let Your Conscience Be Your Guide*, 52 Ga. L. Rev. at 624. All states now protect liberty of conscience through their constitutions and/or statutes. Courtney Miller, Note: *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 331 (2006).[5]

[5] When this article was published, forty-nine states had some form of conscience clause legislation, with variations as to which providers, institutions, procedures and payors were covered. A current comprehensive listing of federal and state conscience protections can be found at: https://www.consciencelaws.org/law/laws/usa.aspx#state (last visited 01/09/2024).

The vast majority of state constitutions expressly define religious liberty in terms of conscience.[6] A few states, while not using the term "conscience," provide similar rights by protecting their citizens against state compulsion. Alabama Const. Art. I, Sec. 4; Iowa Const. Art. I, § 3; Md. Dec. of R. art. 36; W. Va. Const. Art. III, § 15. Some state constitutions contain a broad description of religious liberty, limited only by licentiousness or acts that would threaten public morals, peace and/or safety. Conn. Const. Art. I., Sec. 3; Fla. Const. Art. I, § 3; Md. Dec. of R. art. 36; Miss. Const. Ann. Art. 3, § 18. Several states essentially duplicate the language of the U.S. Constitution. Alaska Const. Art. I, § 4; HRS Const. Art. I, § 4; La. Const. Art. I, § 8; Mont. Const., Art. II § 5; S.C. Const. Ann. Art. I, § 2. Oklahoma's unique language provides for "perfect toleration of religious sentiment" and mode of worship and prohibits any religious test for the exercise of civil rights. Okl. Const. Art. I, § 2.

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[6] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III-IV; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

As Judge Ho explained in his concurring opinion, history and tradition support the conclusion that Respondent Doctors have suffered "a paradigmatically cognizable injury." *AHM v. FDA*, 78 F.4th at 257-258 (Ho, J., concurring). That historical support emerges in many of the early state constitutions, as cited in the concurrence.[7]

State courts also acknowledge rights of conscience but typically weigh those rights against compelling state interests. Conscience has been defined as "that moral sense which dictates . . . right and wrong." *Harden v. State*, 216 S.W.2d 708, 711 (Tenn. 1948) (handling of poisonous snakes could be regulated to protect public health and safety). "Freedom of conscience" is a "fundamental right of every citizen . . . [d]eeply rooted in the constitutional law of Minnesota." *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993) (ruling in favor of deli owner who refused delivery to abortion clinic). *See also In re Williams*, 152 S.E.2d 317, 326 (N.C. 1967) (free exercise includes protection against government compulsion to do what one's religious beliefs forbid, but it is not absolute); *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979) (religiously compelled actions can be forbidden only where they substantially threaten public safety, peace or order); *First Covenant Church v. City of Seattle*, 840

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[7] N.H. Const. of 1784, pt. I, art. IV; Pa. Const. of 1790, art. IX, § 3; Ky. Const. of 1792, art. XII, § 3; Ohio Const. of 1803, art. VIII, § 3 (same); Ala. Const. of 1819, art. I, § 4; Tenn. Const. of 1835, art. I, § 3; Mo. Const. of 1820, art. XIII, § 4; Ark. Const. of 1836, art. II, § 3; Wis. Const. of 1848, art. I, § 18; Minn. Const. of 1858, art. I, § 16; Kan. Const. of 1859, Bill of Rights, § 7.

P.2d 174, 187 (Wash. 1992) (city's interest in preservation of aesthetic and historic structures was not compelling enough to burden church's rights to religion and free speech); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (ruling in favor of corrections officer whose Native American religion required him to maintain long hair); *Guaranteed Auto Fin., Inc. v. Dir., ESD*, 92 Ark. App. 295, 299-300 (2005) (conditioning availability of unemployment benefits upon willingness to violate "cardinal principles" of religious faith effectively penalized free exercise); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 886 (Wis. 2009) (first grade teacher's employment discrimination claim against Catholic school employer failed because her position was closely linked to the school's religious mission—noting the "extremely strong language" of the state constitution, "providing expansive protections for religious liberty").

### B. This Court's decision has broad ramifications for the myriad of other situations where legal mandates invade conscience.

Considering the high value that courts, legislatures, and constitutions have historically assigned to conscience, it is imperative to protect medical professionals who decline to perform morally objectionable acts such as abortion. But abortion is not the only procedure where a legal mandate infringes on conscience.

"Throughout the nineteenth century, American courts granted relief to parties who challenged

government action as injurious to conscience." *AHM v. FDA*, 78 F.4th at 258 (Ho, J., concurring). Other contexts where conscience is relevant include:

- Mandatory military service. "The right to conscientiously object to bearing arms was present in state statutes and constitutions from the time of the founding. Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 U. Cin. L. Rev. 31 (2001)." O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 626 n. 272. *See, e.g., White v. McBride*, 7 Ky. (4 Bibb) 61, 61 (1815) ("free exercise of conscience" supported by provisions in state constitution).

- Public school students' objections to curriculum. *Donahoe v. Richards*, 38 Me. 379, 413 (1854) (required Bible reading); *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 44 N.W. 967, 967-68, 976 (Wis. 1890) (same).

- Oath requirements. *In re Dorsey*, 7 Port. 293, 345, 365-69 (Ala. 1838) (anti-dueling oath required for bar admission); *Innis v. Bolton*, 17 P. 264, 269 (Idaho 1888) (anti-polygamy oath required for voting).

- Physician assisted suicide. Oregon Death with Dignity Act § 4.01, Or. Rev. Stat § 127.885 (2012); Washington Death with Dignity Act § 19, Wash. Rev. Code § 70.245.190 (2008).

- Participation in capital punishment. 18 U.S.C. § 3597(b) (protecting government employees from "attendance at or participat[ion] in any prosecution or execution under this section if

> such participation is contrary to the moral or religious convictions of the employee").

Many statutory exemptions, in a variety of contexts, "seem to protect both religious and nonreligious moral convictions." Chapman, *Disentangling Conscience and Religion,* 2013 U. Ill. L. Rev. at 1459.

### C. Conscience protection is particularly urgent where human life is at stake.

Conscience protection for medical professionals is "of paramount importance" because "the role of doctors is to directly influence the length and quality of human lives." Carstens, *The Right to Conscience vs. The Right to Die*, 48 Pepp. L. Rev. at 180. Concern for the sanctity of human life is evident not only in abortion but in other circumstances where an individual is compelled to participate in ending life. One conscientious objector, seeking an exemption from military duties he considered "immoral and totally repugnant," stated: "I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being." *Welsh v. United States*, 398 U.S. 333, 343 (1970).

In the health care arena, physician assisted suicide is a growing concern. One commentator noted the "significant inconsistencies" in the State of Washington, where pharmacy owners are "free to exercise their right to not distribute fatal drugs to end the life of a terminal patient but would be forced to violate their consciences by distributing emergency contraceptives that they believe cause harm to newly formed lives in the womb." Magnuson, *Let Your*

*Conscience Be Your Guide*, 52 Ga. L. Rev. at 617-618. The Washington Death with Dignity Act, which began as a voter initiative, offers broad exemptions to conscientious objectors. *Id*. at 616; Wash. Rev. Code Ann. §§ 70.245.010, 70.245.190. But regulations enacted by the Washington Board of Pharmacy deny protection to pharmacists seeking a comparable exemption. Pharmacist Responsibility Rule, Wash. Admin. Code § 246-863-095 (2017); Delivery Rule, Wash. Admin. Code § 246-869-010(1) (2017). The Ninth Circuit upheld the regulations in *Stormans, Inc. v. Wiseman*, 794 F.3d 1064, 1088 (9th Cir. 2015), and this Court denied review of "Washington's novel and concededly unnecessary burden on religious objectors." *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2440 (2016) (Alito, J., dissenting). These two procedures—assisted suicide and emergency contraception—cause "similar harm" to conscience, and both involve the "intentional ending of a life." Magnuson, *Let Your Conscience Be Your Guide*, 52 Ga. L. Rev.at 635. But conscience is not equally protected.

## IV. LIBERTY OF CONSCIENCE AND THE FREE EXERCISE OF RELIGION ARE INESCAPABLY INTERTWINED ALTHOUGH NOT IDENTICAL.

Historically, "freedom of religion was the foundation of the broader recognition of freedom of conscience." Scharffs, *Why Religious Freedom?*, 2017 B.Y.U.L. Rev. at 983. Those who drafted and ratified the First Amendment "used religious freedom and liberty of conscience interchangeably." Chapman, *Disentangling Conscience and Religion,* 2013 U. Ill. L. Rev. at 1460.

"Man worships not himself, but his Maker; and the liberty of conscience which he claims is not the service of himself, but of his God." Thomas Paine, The Rights of Man, 65 (Ernest Rhys ed., 1791). *See* Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253 at 253 n. 1. The Founders' then-recent experience with religious persecution produced "a fierce commitment to each individual's natural and inalienable right to believe according to his conviction and conscience and to exercise his religion as these may dictate." *Priests for Life v. United States HHS*, 808 F.3d 1, 5 (D.C. Cir. 2015) (Brown, J., dissenting from denial of Petition for Rehearing En Banc), citing James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901) (internal quotation marks omitted).

The free exercise of religion is inescapably intertwined with conscience. But despite considerable overlap, the two are "not entirely the same." Dhooge, *The Equivalence of Religion and Conscience,*31 ND J. L. Ethics & Pub Pol'y 253 at 279. "Liberty of conscience" is not "exclusively bound" to religious faith or action, but more broadly "grants freedom from coercion regarding beliefs and actions that violate an individual's principles." *Id*. at 278-279. Conscience applies to specific individual situations, while "religion is a source of universal moral law." *Id*. at 280.

Freedom of conscience is broader than the "free exercise of religion" the First Amendment explicitly protects. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*,

103 Harv. L. Rev. 1409, 1491 (1990). Liberty of conscience also underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968): "[T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446-1447 (2011), quoting Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here. The FDA's position requires medical professionals to violate their core moral convictions by facilitating or even personally performing a procedure they believe is immoral, contrary to our nation's historical respect for conscience.

Religious freedom, which "lies at the core of human identity and meaning," is the foundation for protecting other "civil and political rights." Scharffs, *Why Religious Freedom?*, 2017 B.Y.U.L. Rev. at 965. Indeed, "we may not have the intellectual, political, or rhetorical resources to defend conscience if we do not respect and protect the freedom of religion and belief." *Id*. at 960. There is good reason to not only guard religious liberty but also to "develop[] a discrete notion of conscience that is coherent and worthy of protection in its own right." Chapman, *Disentangling Conscience and Religion,* 2013 U. Ill. L. Rev. at 1462. When religion and conscience are "disentangled" and viewed as distinct concepts, "[t]he reasons for protecting them may be different, and, just like the concepts of religion and conscience, may overlap." *Id*. at 1494.

In *Welsh v. United States*, this Court acknowledged the need for legal protection of "deeply and sincerely h[eld] beliefs that are purely ethical or moral in source and content" and that occupy a place in that person's life parallel to that traditionally filled by religious faith. 398 U.S. 333, 340 (1970); *see* Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253 at 253 n. 2. A more recent example is found in *March for Life v. Burwell*, granting an exemption from the contraception mandate to a non-religious organization whose moral opposition was comparable to the beliefs of a religious organization, i.e., a "moral philosophy about the sanctity of human life." 128 F. Supp. 3d 116, 127 (D.D.C. 2015). "This shared moral philosophy" – an "objection to abortifacients" – rendered March for Life and previously-exempted religious organizations identically situated with respect to the accommodated attribute." Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253 at 270.

The victory for freedom of thought recorded in the Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States,* 328 U.S. 61, 68 (1946). Courts have an affirmative "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Medical professionals should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety. "The right to follow one's own conscience is foundational to the religious freedoms enshrined in the

First Amendment," and it is especially critical to those in the medical profession, whose work "inherently involves moral, conscientious, and even spiritual dimensions." Carstens, *The Right to Conscience vs. The Right to Die*, 48 Pepp. L. Rev. at 219.

## V. LIBERTY OF CONSCIENCE IS ENTITLED TO ROBUST LEGAL PROTECTION.

Physicians and patients both have moral and legal rights that must be zealously guarded. The FDA's deregulation of chemical abortion creates an unacceptable threat to the conscience and integrity of physicians who object to participating in abortion. Protecting that integrity is "a hedge against the government's moral tyranny." Chapman, *Disentangling Conscience and Religion,* 2013 U. Ill. L. Rev. at 1499. Liberty of conscience also benefits society because it "undermines the government's tendency toward a moral totalitarianism that society may eventually regret." *Id*. at 1500.

The government's position threatens to breed a nation of persons who lack *conscience*, forcing religious citizens and organizations to set aside conscience or face legal penalties. The tsunami of lawsuits leading to *Hobby Lobby*, challenging the contraception mandate, testifies to the gravity of the matter. The same floodgates are opening again.

### A. Liberty of conscience preserves integrity.

"Freedom of thought, conscience, and belief - including freedom of religion - is the taproot of the tree of human rights." Scharffs, *Why Religious Freedom?*,

2017 B.Y.U.L. Rev. at 962. The FDA's deregulation of chemical abortion penalizes medical professionals who cannot in good conscience participate in abortion. "No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). A citizen may not be excluded from a profession, such as medicine, by unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) (attorney); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor).

None of the rulings leading up to *Roe v. Wade* created a corollary right to draft unwilling accomplices. In the companion case to *Roe v. Wade*, the Supreme Court left intact Georgia's statutory protections for health care workers who object to participating in abortions. *Doe v. Bolton*, 410 U.S. 179, 205 (1973); Ga. Crim. Code § 26-1202(e) (1968). But the FDA's actions now threaten to compel doctors to sacrifice their integrity by becoming de facto accomplices to abortion. This grates against the Constitution and is tantamount to stating that "no religious believers who refuse to [perform abortions] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573.

Abortion is no longer considered a fundamental right. It is not mentioned in the Constitution, nor is it "implicitly protected by any constitutional provision." *Dobbs*, 142 S. Ct. at 2242. No such right is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.*, quoting *Washington v. Glucksberg*, 521 U.S. 701, 721 (1997).

Accommodation of conscientious objections to abortion cannot threaten a right that does not exist.

Even if there were such a "right," it pales in comparison to the religious liberty explicitly protected by the First Amendment. Refusal to accommodate conscience would render objecting medical professionals complicit in a procedure they believe is tantamount to infanticide. No private party is obligated to facilitate abortion for another person, nor is the government obligated to finance it or ensure the most convenient access. Even while *Roe* remained on the books, the state could prefer childbirth and allocate resources accordingly. *Harris v. McRae,* 448 U.S. 297, 315 (1980); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). The government has "no affirmative duty to 'commit any resources to facilitating abortions.'" *Id.*, quoting *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 511 (1989); *see Bowen v. Kendrick,* 487 U.S. 589, 596-597 (1988) (upholding Adolescent Family Life Act's restriction of funding to "programs or projects which do not provide abortions or abortion counseling or referral").

Whatever "reproductive rights" exist under federal or state law, such rights do not trump the inalienable First Amendment rights of those who cannot in good conscience support—let alone facilitate—those rights. Between *Roe* and *Dobbs*, such rights were plucked out of obscure corners of the Constitution. There was deep disagreement over their continued viability, and the debate continues. Americans on both sides of the debate are entitled to express their respective positions. The government itself may adopt a position,

but it violates the Constitution to compel any person to facilitate or perform morally objectionable services contrary to conscience. This severe intrusion on liberty of conscience cannot be justified. Even in the commercial sphere, believers do not forfeit their constitutional rights. Religion does not end where daily life begins. Individuals and businesses must be free to operate with honesty and integrity in dealing with the persons they serve.

### B. Liberty of conscience guards against government tyranny and preserves the right to express a minority viewpoint.

State mandates that override conscience contradict the "right to be let alone," which is "the most comprehensive of rights, and the right most valued by civilized men. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 624. In past decades, it was "rare in American law" for government "to require affirmative conduct or to predicate civil or criminal liability on an omission to act." *Ibid*. Consequently, it was "relatively rare that a state mandate . . . created a crisis of conscience for religious believers." *Ibid*. Sadly, such crises are no longer rare. Cases are legion, and this case is but one example.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The government has no power to force a *speaker* to support or oppose a particular viewpoint. *Hurley v. Irish-*

*American Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). Here, the FDA rules are even more intrusive, demanding that medical professionals perform a morally objectionable procedure that associates them with a viewpoint they abhor.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. As this Court observed, "[t]he struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual." *Girouard*, 328 U.S. at 68. "[T]he product of that struggle" was the First Amendment's protection for religious liberty. *Id*. We dare not sacrifice priceless American freedoms through efforts to broaden access to abortion. Religious citizens and organizations have not forfeited their right to live and pursue their missions in a manner consistent with their faith and conscience.

Legal protection of conscience enhances "government by consent" by ensuring that citizens maintain "personal sovereignty on matters of deep moral conviction." Chapman, *Disentangling Conscience and Religion,* 2013 U. Ill. L. Rev. at 1497. Abortion is indisputably an issue that "raises morally grave questions" with a "wide diversity of answers" offered. *Id*. at 1494. Strong protection for conscience maintains the freedom to express minority viewpoints, encourages further dialogue about contested moral issues, and

"hedges against the chance that the majority has come to the wrong conclusion." *Id*. at 1500.

### C. Liberty of conscience preserves the conscientious objector's right to participate in public life.

James Madison described the free exercise of religion as "a duty towards the creator. It is the duty of every man to render … such homage only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. . . ." Miller, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 349-350 (2006), citing John T. Noonan, Jr., *Lecture: Religious Liberty at the Stake*, 84 Va. L. Rev. 459, 461 (1998) (quoting Thomas Jefferson, Autobiography, in 1 The Writings of Thomas Jefferson 1, 57 (Albert Ellergy Bergh ed., 1907)). St. Thomas More faced the ultimate penalty—*execution*—for his refusal "to commit the serious sin of lying under oath" about the validity of the King's previous marriage. O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 583.

In America today, people of faith face an escalating trend to "squeeze them out of full participation in civic life" through government mandates to engage in conduct forbidden by their faith. *Id*. at 561-562. Such mandates may even be accompanied by efforts to "limit or eliminate entirely" statutory conscience protections. *Id*. at 562.

Government compelled violations of conscience inflict on religious persons "the distressing choice between adhering to one's beliefs and suffering possible legal repercussions." Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253 at 281. Health care professionals "are particularly challenged because the reigning bioethical philosophy places the greatest weight upon the patient's autonomous choices," forcing doctors to comply with a patient's choice of medical procedures regardless of the medical professional's conscientious objections. O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 583. Today's culture allows medical procedures and treatments that are "morally problematic or reprehensible" to some in the health care profession. Miller, *Reflections on Protecting Conscience*, 15 S. Cal. Rev. L. & Social Justice at 329. These dissenters often become "victims of discrimination" needing conscience protections. *Ibid.*

Conscientious objectors in the health care context face a clash of autonomy between doctor and patient. Abortion advocates speak of "choice" and herald the woman's "autonomy to decide what is right for her." *Id.* at 342. But the woman must have assistance, rendering the health care provider a "de facto moral accomplice." *Id.* at 344, citing Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. Contemp. Health L. & Pol'y 47, 52 (1994) (discussing autonomy conflict between physicians and patients). The provider has a corresponding "right to obey his conscience and abstain from participation" in a morally objectionable

procedure. Miller, *Reflections on Protecting Conscience*, 15 S. Cal. Rev. L. & Social Justice at 345. Conscience protection, whether by statute, constitution, or judicial ruling, ensures conscientious objectors the right to equal participation in public life, free of discrimination.

## CONCLUSION

This Court should affirm the decision of the Fifth Circuit.

Respectfully submitted,

James L. Hirsen
*Counsel of Record*
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Tami Fitzgerald
The Institute for Faith And Family
9650 Strickland Road, Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

*Counsel for Amici Curiae*