CASE NO. 24-1576

In the United States Court of Appeals for the Fourth Circuit

AMY BRYANT, M.D. *Plaintiff - Appellee*
v.
TIMOTHY K. MOORE; PHILIP E. BERGER *Intervenors/Defendants - Appellants*
and
JOSHUA H. STEIN, in his official capacity as Attorney General for the State of North Carolina; JEFF NIEMAN, in his official capacity as District Attorney for North Carolina 18th Prosecutorial District; KODY H. KINSLEY, in his official capacity as the North Carolina Secretary of Health and Human Services; MICHAUX R. KILPATRICK, M.D., PHD; CHRISTINE M. KHANDELWAL, DO, in her official capacity as a member of the North Carolina Medical Board; DEVDUTTA G. SANGVAI, M.D., MBA, in his official capacity as a member of the North Carolina Medical Board; JOHN W. RUSHER, M.D., JD, in his official capacity as a member of the North Carolina Medical Board; WILLIAM M. BRAWLEY, in his official capacity as a member of the North Carolina Medical Board; W. HOWARD HALL, M.D., in his official capacity as a member of the North Carolina Medical Board; SHARONA Y. JOHNSON, PHD, FNP-BC; JOSHUA D. MALCOLM, JD, in his official capacity as a member of the North Carolina Medical Board; MIGUEL A. PINEIRO, PA-C, MHPE, in his official capacity as a member of the North Carolina Medical Board; MELINDA H. PRIVETTE, M.D., JD, in her official capacity as a member of the North Carolina Medical Board; ANURADHA RAO-PATEL, M.D., in her official capacity as a member of the North Carolina Medical Board; ROBERT RICH, JR., M.D., in his official capacity as a member of the North Carolina Medical Board *Defendants - Appellees*

On Appeal from the United States District Court for the Middle District of North Carolina at Greensboro, Honorable Catherine C. Eagles, U.S. District Court Judge
Civil Action No. 1:23-cv-00077

BRIEF OF AMICUS CURIAE NC VALUES INSTITUTE IN SUPPORT OF APPELLANTS-DEFENDANTS AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS
FRAP RULE 26.1 and LOCAL RULE 26.1

Amicus curiae, NC Values Institute, a nonprofit corporation, makes the following disclosures:

1. Amicus is not a publicly held corporation or other public entity.

2. Amicus does not have a parent corporation.

3. No publicly held corporation or other publicly held entity owns 10% or more of the stock of amicus, because it is a nonprofit corporation and does not issue stock.

4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

DATED: August 19, 2024

/s/Deborah J. Dewart
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Counsel for *Amicus Curiae*
NC Values Institute

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INTEREST OF AMICUS CURIAE[1]

The NC Values Institute, as *amicus curiae*, urges this Court to reverse the decision of the Fourth Circuit enjoining certain provisions of the North Carolina "Care for Women, Children, and Families Act," enacted to protect women and their unborn children.

NC Values Institute ("NCVI"),[2] 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. See https://ncvi.org. Protecting the sanctity of human life is an issue at the core of NCVI's mission. NCVI's sister organization, North Carolina Values Coalition,[3] was involved in passing the state laws at stake in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has unequivocally returned abortion regulation to the elected representatives of the people. *Dobbs v. Jackson Women's Health*

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[1] *Amicus curiae* submits this brief with the accompanying "Motion for Leave to File Brief of NC Values Institute as *Amicus Curiae*" and certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

[2] Formerly known as The Institute for Faith and Family.

[3] North Carolina Values Coalition is a separately incorporated nonprofit, tax-exempt under Sect. 501(c)(4) of the Internal Revenue Code. *See* https://ncvalues.org.

Organization, 142 S. Ct. 2228, 2243 (2022). Following *Dobbs*, the State of North Carolina exercised its newly recognized regulatory authority in 2023 by enacting the "Care for Women, Children, and Families Act." *See* N.C. Gen. Stat. §§ 90 21.80–21.99 (the "Care Act"). The Care Act requires that only physicians may prescribe mifepristone, a drug used to cause chemical abortions; requires in-person prescribing, dispensing, and administering; mandates in-person follow-up appointments; and requires non-fatal adverse event reporting to the FDA. These provisions, intended to protect pregnant women and their unborn children, were all enjoined by the district court. *Bryant v. Stein*, 2024 U.S. Dist. LEXIS 78176 (M.D. N.C. April 30, 2024); *Bryant v. Stein*, 2024 U.S. Dist. LEXIS 113926 *; 2024 WL 3107568 (M.D. N.C. June 3, 2024); *see* N.C. Gen. Stat. §§ 14-44.1, 90-21.83A, 90-21.83B, 90-21.93. The injunction is contrary to *Dobbs* and decades of precedent affirming *state* responsibility for health and safety laws. The relaxed regulations also threaten to place conscientious physicians in an untenable position when women inevitably suffer the consequences of chemical abortions and come to an emergency room seeking to complete their failed abortions.

This is not the first time abortion proponents have attempted a brazen end-run around *Dobbs* by appealing to federal law to circumvent state restrictions on abortion. Opponents of similar state laws have alleged conflicts with federal law, e.g., the Emergency Medical Treatment & Labor Act (EMTALA), 42 U.S.C.-13 §

1395dd— demanding that providers perform abortions regardless of state law and directly contrary to EMTALA's mandate to consider the unborn child's welfare when stabilizing a pregnant woman (42 U.S.C. §1395dd(e)(1)(A)(i)). *Texas v. Becerra*, 89 F.4th 529 (5th Cir. 2024); *United States v. Idaho*, 83 F.4th 1130 (9th Cir. 2023). In the Idaho case, the Supreme Court granted certiorari but then dismissed the case as improvidently granted. *Moyle v. United States*, 144 S. Ct. 2015, 2016 (June 27, 2024). The government had "clarified that federal conscience protections, for both hospitals and individual physicians, apply in the EMTALA context," allegedly alleviating concerns that health care providers would be stripped of those protections. *Id*. at 2021 (Kagan, J., concurring). That clarification occurred in *FDA v. All. For Hippocratic Med.*, where federal government officials orally acknowledged that "federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences." 602 U.S. 367, 387 (June 13, 2024). But Justice Kagan's concurrence in *Moyle* goes on to say that "EMTALA *requires hospitals to provide abortions that Idaho's law prohibits*. When that is so, Idaho's law is preempted. . . . Federal law and Idaho law are in conflict about the treatment of pregnant women facing health emergencies." *Moyle*, 144 S. Ct. at 2017 (emphasis added). Regrettably, the Court declined "to decide the easy but emotional and highly politicized question [of statutory interpretation] that the case presents," specifically, the preemption issue

concerning "whether EMTALA requires hospitals to perform abortions in some circumstances." *Id*. at 2028 (Alito, J., dissenting). That leaves state laws *everywhere*—North Carolina, Idaho, and other states—vulnerable. The risk extends to state laws protecting health and safety, as well as legal protections for conscientious objectors.

In this case, the challenge to state law rests on the FDA's regulatory framework for approval of high-risk drugs. While states *tighten* restrictions on abortion, the FDA *loosens* restrictions on access to chemical abortions, including drugs like mifepristone, thereby increasing the risk that women will seek emergency care to complete their abortions. *Amicus curiae* writes to highlight two major concerns—first, the federal government's intrusion on matters historically reserved to the states, and second, the massive challenges potentially imposed on conscientious objectors. Neither Federal *legislation* nor *executive* agency regulation preempts either the Constitution or a state's pro-life legislation.

ARGUMENT

I. THIS NATION HAS A LONG TRADITION OF RESPECT FOR THE RIGHTS RESERVED TO THE STATES.

The enjoined provisions of North Carolina law should have withstood judicial scrutiny. Just like the provisions the court declined to enjoin, they focus on "the practice of medicine and a patient's informed consent," and therefore "do not interfere with Congress' purpose." *Bryant v. Stein*, 2024 U.S. Dist. LEXIS

78176, *5. The *states* establish licensing qualifications and regulations for medical professionals. The in-person requirements, both for prescription and follow-up, are intimately concerned with how physicians practice medicine—a *state* responsibility that is inextricably linked to ensuring informed consent and patient safety. "A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity," and "[i]t must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 597 U.S. at 301, citing *Heller* v. *Doe*, 509 U. S. 312, 319-320 (1993) (internal quotation marks omitted). The district court violated this basic principle.

"[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power" between federal and state governments. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *see also New York v. United States*, 505 U.S. 144, 181 (1992) (federal-state division of authority is "for the protection of individuals . . . . [S]tate sovereignty is not just an end in itself.").

"'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Moyle*, 144 S. Ct. at 2035 (Alito, J., dissenting), quoting *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C. J., in chambers). Even the district court admitted that "[the]

presumption against preemption is especially strong when dealing with matters traditionally left to the states, *such as public health and safety, the practice of medicine, and the regulation of medical professionals*," and accordingly, the required starting point was "the assumption that the historic police powers of the states are not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." *Bryant v. Stein*, 2024 U.S. Dist. LEXIS 78176, *9-10 (emphasis added), quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (cleaned up). No such clear purpose appears here—it is the "irreparable injury" to North Carolina that is "clear and manifest."

With *Roe v. Wade,* 410 U.S. 113 (1973) now overruled, *states* may freely regulate abortion. "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). As then Chief Justice Marshall observed two centuries ago, the power to enact "health laws of every description" is reserved to the states. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824). That understanding has stood the test of time. *See, e.g., Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 149 (1855) (states legislate to protect "the lives, limbs, health, comfort, and quiet of all persons"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("states have exercised their police powers to protect the health and safety of their citizens"). It is "beyond question" that Congress recognized, "from an early day," the power of states to

enforce health and safety regulations for their own residents. *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health*, 186 U.S. 380, 387 (1902). Congress must use "*exceedingly clear* language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted) (emphasis added); *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 667 (2022).

"Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring), quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905). These matters "do not ordinarily concern the National Government." *Id*. The "police power of a State" embraces "reasonable regulations established directly by legislative enactment" to "protect the public health and the public safety." *Id*. at 25. There is nothing extraordinary about abortion that warrants federal intervention, particularly after *Dobbs*.

"It's worth remembering that the power of a federal agency to regulate is the power to preempt—to nullify the sovereign power of the States in the area" which explains why 27 States opposed the emergency OSHA vaccine rule several months ago. *MCP No. 165 v. United States DOL*, 20 F.4th 264, 273 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial hearing en banc). The State of North Carolina

"ha[s] an interest in seeing [its] constitutionally reserved police power over public health policy defended from federal overreach." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

II. THIS NATION HAS A LONG TRADITION OF RESPECT FOR RELIGION AND CONSCIENCE.

The Constitution's broad guarantees for religious liberty and conscience extend to medical professionals who wish to conduct business with integrity, consistent with conscience, ethics, and religious faith. Not everyone shares those values but eliminating conscience from the medical profession is a frightening prospect for patients, doctors, and other medical personnel.

A. The State of North Carolina provides broad constitutional and statutory protection for liberty of conscience.

After the Church Amendment (42 U.S.C. § 300a-7(c)) was passed at the federal level, "the majority of states followed suit within the next few years." 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, 624 (Winter 2018). All states 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).[4] North Carolina is among them. The following is the State's broad statutory protection:

> Medical Personnel Objection. - No physician, nurse, or any other health care provider who shall state an objection to abortion on moral, ethical, or religious grounds shall be required to perform or participate in medical procedures which result in an abortion. The refusal of a physician, nurse, or health care provider to perform or participate in these medical procedures shall not be a basis for damages for the refusal or for any disciplinary or any other recriminatory action against the physician, nurse, or health care provider.

N.C.G.S. § 90-21.81C(e) (2023).

North Carolina's state constitution also extends broad protection: "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. Const. Art. I, § 13 ("Religious Liberty"). This liberty is "so basic and fundamental that one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a compelling state interest in the regulation of a subject within the State's Constitutional power to regulate." *In re Williams*, 269 N.C. 68, 80 (1967)

[4] When this article was published, forty-nine states had some form of conscience clause legislation. Current detailed state-by-state information can be found at: https://www.consciencelaws.org/law/laws/usa.aspx#state ("United States Protection of Conscience Laws," last visited 08/08/2024).

(internal quotations and citations omitted). North Carolina lines up with the vast majority of state constitutions, which expressly define religious liberty in terms of conscience.

"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." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Coerced participation in abortion attacks liberties Americans have treasured for over 200 years. It is anathema to the First Amendment principle that the government may not coerce its citizens to endorse or support a cause. The injury to North Carolina and other states is particularly insidious, potentially forcing personal participation in a morally objectionable procedure—abortion. Adding insult to injury, a *federal* agency and a *federal* court attempt to arrogate to themselves the right to nullify laws the *State* of North Carolina has enacted to protect its women and children.

B. Respect for individual conscience is deeply rooted in American history.

Religious liberty and conscience are inescapably intertwined. 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).

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). *Schelske v. Austin*, 649 F.Supp. 3d 254, 292 (N.D. Tex. 2022).

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 Religion 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 proposed adding these words to the text: ". . . nor shall the full and equal

rights of conscience be in any manner, or on any pretext, infringed." *Ibid*., 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).

Freedom of conscience is even 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). Historically, "freedom of religion was the foundation of the broader recognition of freedom of 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, 983. Those who drafted and ratified the First Amendment "used religious freedom and liberty of conscience interchangeably." Nathan S. Chapman, *Disentangling Conscience and Religion,* 2013 U. Ill. L. Rev. 1457, 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). 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).

America's traditional respect for conscience is illustrated by exemptions granting relief from the moral dilemma created by mandatory military service. The Supreme Court, acknowledging man's "duty to a moral power higher than the State," 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." *Seeger*, 380 U.S. at 170, quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. at 269. 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. Mandatory participation in abortion threatens to breed a nation of persons lacking *conscience*, forcing religious citizens and organizations to set aside conscience or face ruinous fines. The tsunami of lawsuits challenging the Affordable Care Act's contraception mandate testifies to the gravity of the matter. The same floodgates are rapidly opening again.

C. Federal law has long respected conscience rights for both patients and health care professionals.

In health care, there is a long history of respect for the conscience and moral autonomy of both patients and professionals. Physicians and patients both have moral and legal rights that must be zealously guarded. 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.

Demanding that a physician act in a "morally unpalatable manner . . . compromises the physician's ethical integrity" and 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. 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, 565 (2006).

After abortion was constitutionalized[5] in *Roe*, "conscience clauses began to emerge" in health care. Magnuson, *Let Your Conscience Be Your Guide*, 52 Ga. L.

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

Rev.at 624. Congress acted swiftly to preserve conscience rights for 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, with limited exceptions.[6] *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 Right to Conscience*, 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. Almost every state has also enacted conscience clause legislation, including North Carolina (Sect. II-A above). Miller: *Reflections on Protecting Conscience for Health Care Providers*, 15 S. Cal. Rev. L. & Social Justice at 331.

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[6] Originally (1977) the mother's life was the sole exception. P.L. 94-439, § 209. Later versions added exceptions for rape, incest, or severe injury to the mother's health. See https://crsreports.congress.gov/product/pdf/IF/IF12167 (last visited 08/08/24).

Even seemingly modest intrusions on conscience are constitutionally forbidden: "Thomas More went to the scaffold rather than sign a little paper for the King." *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d at 635 (Jones, J., dissenting from denial of Petition for Rehearing En Banc).

D. This case implicates *conscientious objectors*—not civil disobedience.

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). Belief and action are the "two predominant features" of conscience. Lucien J. Dhooge, *The Equivalence of Religion and Conscience,* 31 ND J. L. Ethics & Pub Pol'y 253, 266 (2017). Belief that abortion is morally wrong leads to action—a conscientious physician must 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." *Id*. at 267.

"Actions speak louder than words" is a common idiom reflected in First Amendment precedent about expressive *conduct*. But does precedent against compelled *speech* apply to compelled *conduct*? Not necessarily. But mandating an act that violates conscience, where abstention would ordinarily *not* be illegal, is in some respects analogous to compelled speech. This is particularly true where the mandatory act associates the person with a specific viewpoint he abhors. It is

ordinarily not illegal to refrain from performing an abortion. But compliance with an abortion mandate would affirmatively associate a doctor with a pro-abortion viewpoint. Much like compelled speech, this darkens the "fixed star in our constitutional constellation" that forbids any government official, "high or petty," from prescribing "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word *or act* their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added) (Pledge of Alliance combines speech and action).

Many winning Free Exercise cases decided prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) involved conscientious objectors seeking freedom from state compulsion to commit an act against conscience. *See, e.g., Girouard v. United States,* 328 U.S. 61; *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *Barnette,* 319 U.S. 624 (1943) (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Losing plaintiffs, including *Smith*, are often "civil disobedience" claimants seeking to actively engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

Court decisions have broad ramifications for the myriad of situations where legal mandates invade conscience and an exemption does not threaten public peace or safety. Conscientious objector claims are "very close to the core of religious liberty." O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 565, 611, 615-616. Individual 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. Considering the high value 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.

III. FEDERAL LAW MAY NEVER PREEMPT OUR *FIRST* LIBERTY: RELIGIOUS FREEDOM.

The laws governing reproduction have changed dramatically over the years. At one time the states were free to outlaw contraception or limit it to married couples. That changed in two Supreme Court key decisions preceding *Roe v. Wade. See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing right of married couples to use contraception due to the "zone of privacy" in that relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to single persons). But none of these rulings created a corollary right to draft unwilling accomplices. In the companion case to *Roe*, the 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 if federal action—legislative, executive, or judicial—is permitted to trump a state's pro-life protections, that threatens to compel an individual doctor to become a de facto accomplice to a morally objectionable procedure. This grates against the Constitution and is tantamount to stating that "no religious believers who refuse to [perform abortion] may be included in this part of our social life." O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573.

A. Abortion is a highly controversial, divisive issue.

Many deeply religious people view abortion as a grave moral wrong. Even with the issue returned to elected representatives, Americans are profoundly troubled and deeply divided. 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 (and is) deep disagreement over their continued viability. Americans on both sides may express their respective positions. The government itself may adopt a position but may not compel individuals to facilitate or perform morally objectionable services contrary to conscience.

B. Liberty of religion and conscience should not be dismantled to compel individual doctors to perform abortions.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. 624. 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, coerced abortion would extend even further by demanding that medical professionals perform a morally objectionable procedure that associates them with a viewpoint they abhor. Religious liberty collapses under the weight of secular ideologies that employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 186-188.

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. “The 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 v. United States*, 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 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.

C. Accommodation of a medical professional's conscience does not threaten any person's fundamental rights.

Abortion is not 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. The failure to accommodate would render objecting medical professionals complicit in a procedure they believe is tantamount to infanticide. Even if abortion had the status of a legal right, no private party is obligated to facilitate it for another person.

IV. THE GOVERNMENT MUST RESPECT CONSCIENCE IN ALL OF PUBLIC LIFE.

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. O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 561-562. Such mandates may be accompanied by efforts to "limit or eliminate entirely" statutory conscience protections. *Id*. at 562. Courts have a "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. at 592. Government-mandated abortion attacks conscience, penalizing medical professionals who cannot in good conscience perform abortions. But "[n]o 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 the practice of medicine (or any other profession) 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).

The First Amendment demands government neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Coerced participation in abortion guts the First Amendment, brazenly exhibiting the "callous indifference" to religion never intended by the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach,* 343 U.S. at 314. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id*.

A. 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 another growing concern where human life is at risk. One commentator noted "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 comparable protection to pharmacists. 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 the Supreme 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. This case, too, involves "similar harm" to the conscience of medical professionals.

B. Even in the commercial sphere, believers do not forfeit their constitutional rights.

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. Such "personal sovereignty" does not evaporate in the public sphere where citizens conduct business. 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.

Religion does not end where daily life begins. When religion is shoved to the private fringes of life, constitutional guarantees ring hollow. McConnell, *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Morality necessarily

intersects the public realm. All individuals and businesses should be free to operate with a high level of honesty and integrity in dealing with the persons they serve.

C. The government could not satisfy the "compelling interest" or "least restrictive means" prongs of RFRA.

Even if there were viable legal arguments for preemption, "RFRA broadly prohibits the Federal Government from violating religious liberty. See 42 U. S. C. §2000bb-1(a)." *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 237, 2389 (2020) (Alito, J., concurring). Protection for religious liberty covers every "branch, department, agency, [and] instrumentality" of the Federal Government, including any "person acting under the color of " federal law. §2000bb-2(1). It also extends to the "implementation" of the law. §2000bb-3(a).

Sometimes 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*, 140 S. Ct. at 2391 (Alito, J., concurring); see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723-726 (2014); *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 715-716 (1981). Here, personal participation is required if federal law were found to preempt state law protection for unborn life. The doctor does not merely participate in a "chain of causation."

It is not difficult to ascertain the weight of the burden. If the government imposed monetary penalties or exclusion from federal funding, the burden would be

indisputably "substantial." Accordingly, the government must "demonstrate[] that application of the burden to *the [doctor]*—(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(a), (b) (emphasis added); *Hobby Lobby*, 573 U.S. at 705.

The government "must clear a high bar" to establish a compelling state interest. *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring). "[O]nly the gravest abuses, endangering paramount interests" justify limiting free exercise. *Id*. at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The Government would have to show that it would commit one of "the gravest abuses" of its responsibilities if it did not coerce objecting doctors to perform abortions. That is totalitarian nonsense—it is coerced performance of abortion that would constitute one of "the gravest abuses" of government power America has ever seen.

A heavy burden falls on the *government* to show a compelling interest in applying the challenged law to "the *particular claimant* whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006) (quoting §2000bb-1(b)) (emphasis added). The government must "scrutinize[] the asserted harm of granting *specific* exemptions to *particular* religious claimants" (*id*. at 43l, emphasis added)—here,

the doctors who object to performing abortions. The government could not possibly jump that high hurdle.

Nor could the government satisfy the "least restrictive means" requirement. In *Hobby Lobby*, the administration asserted a "compelling" interest in "gender equality." *Hobby Lobby*, 573 U.S. at 726. That interest was too broadly formulated. *Id*. Instead, the government must "specifically identify an 'actual problem' in need of solving" and show that the burden on the *particular* claimant's rights is "actually necessary" for the solution. "Predictive judgment[s]" and "ambiguous proof" are insufficient. Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 432 (2013), quoting *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738-2739 (2011).

CONCLUSION

This Court should reverse the decision of the district court enjoining North Carolina's protections for women and unborn children.

Dated: August 19, 2024

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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