No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. In enacting RFRA, Congress did not, for the first time, confer on for-profit corporations, or their owners, directors, and managers, the right to seek exemptions from corporate regulation 6
B. Respondents' claims would fail even if the contraceptive-coverage provision were subject to RFRA's compelling-interest test 12

TABLE OF AUTHORITIES

Cases:

Braswell v. *United States*, 487 U.S. 99 (1988) 10
Braunfeld v. *Brown*, 366 U.S. 599 (1961) 2, 9
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) 7, 13
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 3, 13
Employment Div. v. *Smith*, 494 U.S. 872 (1990) 7
Estate of Thornton v. *Caldor, Inc.*, 472 U.S. 703 (1985) 3
Gallagher v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961) 8, 9
Gilardi v. *United States Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), petitions for cert. pending, Nos. 13-567, 13-915 (filed Nov. 5, 2013, and Jan. 30, 2014) 6, 7, 8
Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) 13, 16
Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) 11
Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *EEOC*, 132 S. Ct. 694 (2012) 8, 13

Cases—Continued: Page

Liberty Univ., Inc. v. *Lew*, 733 F.3d 72 (4th Cir.), cert. denied, 134 S. Ct. 683 (2013) 15, 22
McClure v. *Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), appeal dismissed, 478 U.S. 1015 (1986) 20
McGowan v. *Maryland*, 366 U.S. 420 (1961) 9
Mitchell v. *Helms*, 530 U.S. 793 (2000) 11
New Colonial Ice Co. v. *Helvering*, 292 U.S. 435 (1934) 9
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 3
Schenley Distillers Corp. v. *United States*, 326 U.S. 432 (1946) 9
Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985) 4, 21
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 13
United States v. *Lee*, 455 U.S. 252 (1982) 2, 3, 5, 9, 14, 21
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 8

Constitution and statutes:

U.S. Const.:
Amend. I 1, 2
Establishment Clause 3
Free Exercise Clause 1, 6, 13
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 7, 20
42 U.S.C. 2000e(b) 20
42 U.S.C. 2000e-1(a) 20
Dictionary Act, 1 U.S.C. 1 7

Statutes—Continued: Page

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 13
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 1
42 U.S.C. 2000bb-1(a) 4, 7
42 U.S.C. 2000bb-1(b)(2) 24
Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.* 3
26 U.S.C. 3121(b) 21
42 U.S.C. 300gg-13(a)(1) (Supp. V 2011) 17
42 U.S.C. 300gg-13(a)(2) (Supp. V 2011) 17, 18, 22
42 U.S.C. 300gg-13(a)(4) (Supp. V 2011) 17, 18
Ariz. Rev. Stat. Ann. §§ 41-1493 *et seq.* (2011) 20

Miscellaneous:

David Bernstein, *Guest post from Prof. Doug Laycock: What Arizona SB 1062 actually said*, The Wash. Post (Feb. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/ 21
75 Fed. Reg. (July 19, 2010):
p. 41,740 17
pp. 41,741-41,744 17
pp. 41,745-41,752 17
78 Fed. Reg. (July 2, 2013):
p. 39,872 19
p. 39,877 15
Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011) 19

Miscellaneous—Continued: Page

Letter from Janice K. Brewer, Governor, State of Ariz., to the Hon. Andy Biggs, President of the Ariz. State Senate (Feb. 26, 2014), http://azgovernor.gov/dms/upload/PR_022614_SB1062VetoLtr.pdf 20

Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom* (2007), http://www.lc.org/media/9980/attachments/memo_vaccination.pdf 22

Office of the Assistant Sec'y for Policy, U.S. Dep't of Labor, *Fair Labor Standards Act Advisor: Exemptions*, http://www.dol.gov/elaws/esa/flsa/screen75.asp (last visited Mar. 11, 2014) 21

S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014) 20

U.S. Census Bureau, U.S. Dep't of Commerce, *Statistics about Business Size (including Small Business)* (2008), https://www.census.gov/econ/smallbus.html 20

Eugene Volokh, *4B. RFRA Strict Scrutiny: The Argument from Secular Exceptions*, The Volokh Conspiracy (Dec. 5, 2013), http://www.volokh.com/2013/12/05/4b-rfra-strict-scrutiny-argument-secular-exceptions/ 19

In the Supreme Court of the United States

No. 13-354

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

Respondents have not identified a single case in this Nation's history in which a commercial enterprise has successfully invoked either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, to secure what respondents seek here: an exemption from a neutral law regulating a for-profit corporation's commercial activities. They point to nothing in our laws and traditions that would support such an exemption. And they all but ignore that the unprecedented step they ask this Court to take would extinguish the statutorily guaranteed rights of the corporations' 13,000 employees (and their covered dependents) to important health benefits that are part of the employees' compensation. So it is remarkable that respondents would open their brief (Br. 1) by saying that this case presents "one of the

most straightforward violations of the Religious Freedom Restoration Act this Court is likely to see."

Most strikingly, respondents insist (Br. 55) that the health, dignity, and liberty interests of the corporate-respondents' own 13,000 employees—who may not share respondents' beliefs—"should be irrelevant to the RFRA analysis." To the contrary, when a party seeks a religious exemption from a neutral law, the potential impact on third parties is at the very core of the analysis. In *United States* v. *Lee*, 455 U.S. 252 (1982), for example, the Court's denial of a free-exercise exemption from Social Security taxes to the proprietor of a commercial enterprise rested in significant part on the fact that "[g]ranting an exemption * * * operates to impose the employer's religious faith on the employees" by denying them the statutory protections of the Social Security system. *Id.* at 261; see *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609 (1961) (plurality opinion) (exemption from Sunday closing laws "might well provide" proprietors of commercial enterprises "with an economic advantage over their competitors who must remain closed on that day").

Lee and *Braunfeld* are the very pre-RFRA precedents respondents cite (*e.g.*, Br. 19) as a basis for finding their claims cognizable. Yet respondents miss the essential point of those decisions. The vibrant religious pluralism that the First Amendment (and, by extension, RFRA) protects is a guarantee of freedom of conscience for *all*. *Braunfeld*, 366 U.S. at 606 (plurality opinion) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference."). For that very reason, these provisions cannot be invoked to justify religious exemptions from neutral laws when those exemptions would come at

the expense of other members of society who may hold different beliefs and whose own statutory rights and autonomy, and, indeed, free exercise of religion, may be compromised if such exemptions were granted. As Justice Jackson observed, the "limitations which of necessity bound religious freedom * * * begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Prince* v. *Massachusetts*, 321 U.S. 158, 177 (1944) (opinion of Jackson, J.); see *Lee*, 455 U.S. at 261 (holding that when people "enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity").

Indeed, even before RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, were enacted, this Court made clear that a statutorily granted religious accommodation may violate the Establishment Clause if the burden of providing the accommodation falls on third parties. *Estate of Thorton* v. *Caldor, Inc.*, 472 U.S. 703, 708-710 (1985) (invalidating statute requiring employers to accommodate employee Sabbath observance without regard to burdens on the employer or other employees). The Court unanimously later rejected an Establishment Clause challenge to RLUIPA (whose standard is substantively identical to RFRA's) because "[p]roperly applying RLUIPA, courts *must* take adequate account of the burdens a requested accommodation may impose on [third parties]." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added) (citing *Caldor*). Respondents ignore *Cut-*

ter, doubtless because they cannot reconcile their position with *Cutter*'s unambiguous command.

To achieve the unprecedented result they seek, respondents must stretch every operative provision of RFRA well beyond what Congress could reasonably have intended. They would interpret a "person's exercise of religion" (42 U.S.C. 2000bb-1(a)) to include unprecedented claims by for-profit corporations that would predictably give rise to exemptions that burden employees and other third parties, and would generate intractable problems of administration. They would interpret RFRA's substantial-burden test to be satisfied whenever a corporate or individual plaintiff alleges a sincere religious objection to obeying a law that is enforced through non-trivial sanctions. They would interpret RFRA's compelling-interest standard so that it cannot be satisfied if the law challenged is subject to exceptions. And they would interpret RFRA's least-restrictive-means test to require government to step in and pay for any benefit to which employers assert a religious objection.

It is not difficult to imagine the consequences that would follow from adopting respondents' approach. The free-exercise challenge to the minimum wage law this Court rejected in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985) (*Alamo Foundation*), would be transformed into a meritorious RFRA claim even if brought by a for-profit corporation. The free-exercise challenge to employer Social Security taxes this Court rejected in *Lee* would likewise be transformed into a meritorious RFRA claim. A for-profit corporation could invoke RFRA to demand an exemption from the Affordable Care Act's requirement that employer health plans cover rubella

vaccinations for children and parents, and there would be no basis for distinguishing that claim from the claims now before the Court. Respondents' approach would even allow a for-profit corporation to discriminate in employment, such as by refusing to hire a devout member of a religion other than that of the corporation owner's. See pp. 20-22, *infra* (setting forth analysis under respondents' approach of actual claims for exemptions).

Needless to say, such outcomes are flatly inconsistent with this Court's admonition that the limits people of faith place on their own conduct "are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. RFRA should not be read to attribute to Congress an intent to accomplish sub silentio the revolution in free-exercise law that respondents seek. Rather, the reading of RFRA's text that best comports with our laws and traditions is one that does not confer exemptions on for-profit corporations from neutral laws regulating their commercial activities, or recognize claims by owners, managers, and directors of such corporations when the relief sought is an exemption for the corporation.

We acknowledge that the Greens' religious beliefs are sincerely held and that they do not check their beliefs at the door when they operate their businesses. And we recognize that in situations involving small closely held corporations owned, directed, and managed by a tightly knit group of individuals, the claim that the corporations' actions reflect the religious commitments of their owners is not without appeal. But respondents cannot articulate a principled justification for allowing claims to proceed in such circum-

stances that would not also embroil courts in disputes over corporate governance (such as the rights of minority owners) or the meaning and sincerity of religious commitments (such as those made by proxy vote in public corporations)—and that would not, in violation of *Cutter*, also risk harm to vitally important interests of third parties, who likewise do not check their sincerely held beliefs and values at the door when they enter the workplace or seek medical care.

There is no need in this case, however, to decide whether there might be circumstances in which a for-profit corporation (or the corporation's owners on its behalf) might nonetheless advance a cognizable claim of a Free Exercise Clause or RFRA violation. Here, respondents' claim to an exemption should be rejected because this law applies generally to the furnishing of health coverage by employers such as the corporate-respondents and the government has compelling interests in the public health and in safeguarding the statutory rights of the corporate-respondents' 13,000 employees and their dependents to medically and economically valuable benefits.

A. In Enacting RFRA, Congress Did Not, For The First Time, Confer On For-Profit Corporations, Or Their Owners, Directors, And Managers, The Right To Seek Exemptions From Corporate Regulation

It has long been understood that when for-profit corporations are organized as separate legal entities to participate in the commercial world, they "submit themselves to legislation—such as Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Affordable Care Act—designed to protect the health, safety, and welfare of employees." *Gilardi* v. *United States Dep't of Health & Human Servs.*, 733

F.3d 1208, 1242-1243 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), petitions for cert. pending, Nos. 13-567, 13-915 (filed Nov. 5, 2013, and Jan. 30, 2014). Congress has authorized certain exemptions for churches and religious organizations in such statutes, but it has never extended such exemptions to any employer operating in the "commercial, profit-making world." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 337 (1987).

1. Respondents contend (Br. 16-33) that Congress departed from that unbroken history by conferring free-exercise rights on for-profit corporations in RFRA, even though the statute's text and legislative history contain no suggestion that such a step was intended. Respondents argue that, by using "the unadorned term 'person' in RFRA," Congress triggered application of the Dictionary Act and thus conferred a cause of action on *all* "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." *Id.* at 16, 25-26 (quoting 1 U.S.C. 1). Because the operative phrase in RFRA is "person's exercise of religion," 42 U.S.C. 2000bb-1(a), however, a court must "construe the term 'person' together with the phrase 'exercise of religion.'" *Gilardi*, 733 F.3d at 1211; 1 U.S.C. 1(terms in Dictionary Act must be read in "context"). The meaning of the statutory text therefore must be informed by "the full body" of "free-exercise caselaw" that preceded *Employment Division* v. *Smith*, 494 U.S. 872 (1990), *i.e.*, the decisions Congress meant RFRA to embody. *Gilardi*, 733 F.3d at 1212.

Significantly, "during the 200-year span between the adoption of the First Amendment and RFRA's

passage," this Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." Pet. App. 115a (Briscoe, C.J., dissenting in relevant part); accord *Gilardi*, 733 F.3d at 1211-1215. Congress, in adopting a self-described restorative statute, could not have intended it to embody an understanding of religious exercise that was a quantum leap beyond anything that had ever been recognized. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The only counter-examples respondents can muster (Br. 20) involve free-exercise claims raised by churches and related religious organizations. But, unlike those entities, for-profit corporations have never been regarded under the Religion Clauses, or in our societal and legal traditions, as institutions with their own freestanding religious identity. They simply are not equivalent to "an 'ecclesiastical corporation'" (*ibid.* (citation omitted)) and have never been thought to be entitled to the "special solicitude" that is afforded "to the rights of religious organizations" through which individuals collectively worship and exercise their faith. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012) (*Hosanna-Tabor*). Thus, this Court should hold that RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.[1]

---

[1] Respondents state (Br. 20) that in *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), "five members of the Court assumed that a commercial corporation

2. Respondents cannot overcome the corporate-respondents' inability to secure an exemption by seeking the very same corporate exemption through a RFRA claim asserted by the Greens as individuals. To the contrary, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261.

While the Greens are persons who exercise religion, there is a critical separation between the Greens and the corporation they have elected to create. "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946) (per curiam). Few norms are more deeply ingrained into the fabric of American law than the principle that "a corporation and its stockholders are deemed separate entities." *New Colonial Ice Co.* v.

---

owned by four Orthodox Jewish shareholders could challenge a Sunday closing law under the Free Exercise Clause." A plurality of the Court, however, stated expressly that it "need not decide whether appellees have standing" because *Braunfeld*, *supra*, was fatal to their claim on the merits. *Gallagher*, 366 U.S. at 631. Justices Frankfurter and Harlan likewise rejected the claim on the merits without considering whether a for-profit corporation could assert a free-exercise claim. See *ibid.* (incorporating by reference *McGowan* v. *Maryland*, 366 U.S. 420, 459 (1961) (separate opinion of Frankfurter, J.)). In any event, the corporation was not the only party in *Gallagher*; three of the customers were parties as well. See *id.* at 618.

Helvering, 292 U.S. 435, 442 (1934). In case after case, this Court has interpreted federal statutes in a manner that respects this bedrock legal principle. See Gov't Br. 23-26. Respondents cite no contrary example.

Nor can the Greens state a cognizable RFRA claim by declaring that "Hobby Lobby and Mardel act only through the Greens." Resp. Br. 30. All "[a]rtificial entities such as corporations may act only through their agents," and an agent's action "is not deemed a personal act, but rather an act of the corporation." *Braswell* v. *United States*, 487 U.S. 99, 110 (1988). When the Greens act on behalf of the corporations, they do not do so in their personal capacities.

3. Respondents also fail to come to grips with the implications of their interpretation of RFRA's substantial-burden test in the corporate context. Respondents would confine the analysis to two steps: First, the court "must identify the sincere religious exercise at issue," and, "[t]hen, it must determine whether the government has placed substantial pressure on the plaintiff to abstain from that religious exercise." Resp. Br. 34. In other words, a for-profit corporation would establish a substantial burden (and thus require the government to meet RFRA's compelling-interest test) merely by asserting a sincere religious objection to any tax, employment, civil rights, or other law that is enforced by meaningful sanctions.

Respondents identify nothing indicating that Congress intended to ignore background legal principles or to strip RFRA of established and common-sense limitations (such as principles of proximate cause, attenuation, and intervening third-party actions) traditionally used to determine which injuries are legally

cognizable and which are not. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268-269 (1992); see Gov't Br. 32-37; Gov't Br. at 35-38, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356 (oral argument scheduled for Mar. 25, 2014) (Gov't *Conestoga* Br.). These are inherent limitations on free-exercise rights in settings in which other persons with their own freedoms and beliefs also participate.

4. Respondents' reading of RFRA would produce intractable problems of administration.

a. Permitting a for-profit corporation to seek exemptions from laws that bind its competitors based on the corporation's asserted religious beliefs or exercise would pose serious problems for corporate governance and free-market competition. See Gov't *Conestoga* Br. at 29-32.

b. Determining the sincerity of claims to religious exercise by commercial enterprises in their own right would also entangle courts in difficult examinations of a corporation's asserted religion. Respondents' amicus Knights of Columbus candidly acknowledges (Br. 22-24) that sincerity inquiries involving for-profit corporations would "present certain challenges," but suggests that they could be resolved by reference to "[s]hareholder votes" and judicial examination of corporate "mission statement[s]," "employee manuals, handbooks, and contracts," the "manner in which [the corporation] conducts its day-to-day operations," and the religious beliefs of the corporation's "clientele or customers." "It is well established," however, "that courts should refrain from trolling through a person's or institution's religious beliefs," *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Congress could not have intended RFRA to be interpreted in a

way that would routinely lead to such intrusive inquiries, and respondents offer no workable alternative.

c. Respondents' interpretation of RFRA would also seemingly authorize RFRA challenges by corporate employees with religious objections to duties the law places on their employers. Respondents attempt to disavow (Br. 31 n.14) such a "novel 'management standing' rule," Pet. App. 136a (Briscoe, C.J., dissenting in relevant part) (citing *id.* at 86a (Gorsuch, J., concurring)), but they fail to offer any limiting principle that would preclude it. Under that theory, *any* human resources manager of *any* corporation could sue to exempt the corporation from the contraceptive-coverage provision or any other generally applicable law to which he has a religious objection to implementing. But it was settled before RFRA's enactment that an employee cannot obtain, even from his employer, a religious accommodation in the workplace that comes at the expense of other employees, see Gov't Br. 30-31, much less one that would require an exemption *for the employer* from a generally applicable law to prevent any conflict with the employee's personal religious beliefs.

B. Respondents' Claims Would Fail Even If The Contraceptive-Coverage Provision Were Subject To RFRA's Compelling-Interest Test

Even assuming that respondents satisfy the initial requirements for a claim under RFRA, their claim fails because the religious beliefs of the Greens cannot override statutory provisions protecting the interests of the corporations' 13,000 employees.

1. As the government's opening brief explains (at 38-46), the employees of Hobby Lobby and Mardel have their own statutory rights to preventive-services

coverage, which Congress incorporated into the privately-enforceable Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq*., and the government has a compelling interest in safeguarding those rights.

Respondents contend (Br. 54-55) that the interests of the employees and their covered dependents are "irrelevant"; that the employees and dependents would suffer no "cognizable harm" from respondents' requested exemption; and that the employees and dependents cannot rightfully complain about being denied the benefits of a "Peter-to-Paul mandate[]."

As discussed above, see pp. 1-4, *supra*, the third-party interests to which respondents give the back of the hand actually doom their RFRA claim under this Court's precedents. *Cutter*, 544 U.S. at 720; see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80-81 (1977) (rejecting reading of Title VII's religious-accommodation provision that would require work-place accommodation "at the expense of other[]" em-ployees).

This Court has approved certain accommodations under the Free Exercise Clause or RFRA where it is only the government itself that will be directly affect-ed, and the effect on others in society is indirect and diffuse. See, *e.g.*, *Gonzales* v. *O Centro Espirita Be-neficente Uniao do Vegetal*, 546 U.S. 418, 430-437 (2006) (*O Centro*). But respondents cite no case (out-side of the special context of autonomy for churches and religious institutions, see *Hosanna-Tabor*, *supra*, and *Amos*, *supra*) in which the Court has upheld, much less *required*, an exemption from a generally applicable law where the cost would be borne directly by a group of identifiable individuals, such as the

employees and covered dependents here. To the contrary, in *Lee*, where an employer sought an exemption from a direct government assessment, this Court denied it, emphasizing that an exemption would "operate[] to impose the employer's religious faith on the employees," who would lose their benefits if the employer's religious objection to participation in Social Security excused him from his obligations. *Lee*, 455 U.S. at 261.

There is an established distinction between, on the one hand, accommodations by the government itself that may occasionally be called for to guard the freedom and autonomy of individuals and religious institutions and, on the other hand, exceptions from generally applicable laws that would impose harms on the very individuals those laws are designed to protect. That distinction respects the nature of religious accommodation in a "cosmopolitan nation made up of people of almost every conceivable religious preference." *Lee*, 455 U.S. at 259 (citation omitted). There are circumstances in which that "cosmopolitan nation" as a whole should accept the costs of accommodating an individual's religious exercise in order to respect a sphere of autonomy for that exercise. But employees are not required to share the religious beliefs of their employer's owners, and they should not be required to sacrifice their own federally protected rights to ensure that their employer's owners are afforded the fullest possible effectuation of their beliefs.

Virtually any regulation of the employer-employee relationship could be dismissively characterized (Resp. Br. 55) as a "Peter-to-Paul mandate[]": the obligations to pay a minimum wage, to provide a workplace free of threats to health and safety, to permit

family and medical leave, to avoid discrimination in hiring and firing. None of those obligations exist independent of federal law, and, by respondents' logic, all could be minimized as compelled transfers of benefits from employer to employee. In enacting RFRA, which is another federal statute, Congress surely did not render the vital rights of employees under the statutory schemes creating such obligations "irrelevant" (*ibid.*) to an employer's demand for an exemption on religious grounds. To the contrary, a commercial employer's ability to freely exercise his religion in the workplace reaches its limit when it collides with the rights of his employees, who are autonomous individuals with rights and freedoms, including religious freedoms, of their own.

In any event, respondents' disparaging characterization of the benefit at issue here is incorrect. Employees typically pay a portion of the premium for their employer-provided health coverage, see Gov't Br. 2, and premiums are calculated based on the scope of coverage. Nor is the employer's share of the premium a gift to the employee; it is instead "part of an employee's compensation package," *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 91 (4th Cir.) (citation omitted), cert. denied, 134 S. Ct. 683 (2013), and one that is particularly advantageous to employers because it is heavily subsidized by the federal government through favorable tax treatment, see Gov't Br. 2; Pet. 2 n.1. Finally, respondents' discussion of "Peter-to-Paul mandates" (Br. 55) is particularly inapt because the contraceptive-coverage provision does not actually impose economic costs on employers. 78 Fed. Reg. 39,877 (July 2, 2013) ("[T]he costs of providing contraceptive coverage are balanced by cost savings from

lower pregnancy-related costs and from improvements in women's health.").

2. As the government has demonstrated, the link between the contraceptive-coverage provision and women's health is supported by ample empirical evidence demonstrating that providing women access to contraceptives without cost-sharing can have significant health benefits for them and their children, and, conversely, that financial barriers to such access can result in significant health problems. Gov't Br. 46-51; see Gov't *Conestoga* Br. at 42-49. Unlike petitioners in *Conestoga* (see 13-356 Pet. Br. at 54-58), respondents here do not dispute the government's showings that access to medically appropriate contraceptives effectively prevents unintended pregnancies and that reducing costs and logistical barriers to obtaining contraceptive services promotes their use. See Gov't Br. 46-51; see also Gov't *Conestoga* Br. 44-48.

Instead, respondents contend that the government relies on only "'broadly formulated interests'" and "makes no attempt to justify" them "with respect to the specific burden on [r]espondents' religious exercise, as RFRA requires." Resp. Br. 46 (quoting *O Centro*, 546 U.S. at 431). That characterization is baffling. As the government explains at length in its opening brief (at 38-46), application of the contraceptive-coverage provision to corporate-respondents is justified because the exemption they seek would directly and tangibly harm those Hobby Lobby and Mardel employees and covered dependents who would choose to utilize the services the plan is required to offer. Those are real people, whose statutory rights, health, and pocket-book interests—not to mention individual dignity and autonomy—are directly at issue "*in the*

circumstances of this case." Resp. Br. 45 (citation omitted). Contrary to respondents' apparent view, those known individuals may not be disregarded as mere "abstract[ions]." *Ibid.* (citation omitted).

Respondents contend (Br. 46) that the contraceptive-coverage provision does not advance a compelling interest because Congress itself did not expressly prescribe it in the Affordable Care Act or statutorily enumerate "specific drugs and devices" to be covered. By that logic, there would be no compelling interest supporting *any* of the services encompassed within the preventive-services coverage provision. Congress did not specify any particular services, but instead set out four general categories that must be covered in accordance with the recommendations of medical experts. Gov't Br. 4; Pet. 4-5. Congress did not, for example, enumerate the particular immunizations that must be covered, instead leaving that question to an advisory committee to the Centers for Disease Control and Prevention. Compare 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011) with 75 Fed. Reg. 41,740, 41,745-41,752 (July 19, 2010). Nor did Congress mandate coverage of colorectal cancer screening or other disease-identification services—those were the recommendations of the United States Preventive Services Task Force. Compare 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011) with 75 Fed. Reg. at 41,741-41,744.

Likewise, Congress did not specifically enumerate coverage for screening and counseling for domestic violence, contraceptives, or any other particular preventive services for women, instead incorporating guidelines issued by the Health Resources and Services Administration, 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011), which in turn looked to the experts at

the Institute of Medicine for recommendations. The fact that all of the services encompassed by the preventive-services coverage provision are based on the recommendations of medical experts should make them more, not less, worthy of respect.

Respondents contend (Br. 47 n.21) that the government must make a contraceptive-by-contraceptive showing of "public health justification." Again, respondents misunderstand the nature of covered medical services in general and the contraceptive-coverage provision in particular, which entrusts decisions about which services are appropriate to a patient and her healthcare provider, not to an employer or a court. Just as Congress intended coverage for *all* recommended immunizations, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011), it intended coverage for *all* recommended "preventive care and screenings" for women, 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011).

In any event, there are obvious and powerful public health justifications for coverage of the particular drugs and devices to which respondents object. The government has explained that the IUD is significantly more effective (and significantly more expensive) than many other contraceptive methods. See Gov't Br. 48; Gov't *Conestoga* Br. 46-47. Moreover, unlike other methods, emergency contraceptives such as Plan B and ella allow "women to prevent pregnancy after rape, unprotected sex or the failure of some other contraceptive." Am. Coll. of Obstetricians & Gynecologists Amicus Br. 25. And RFRA claims indistinguishable from respondents' are now pending that involve employer objections to *all* FDA-approved contraceptives. Gov't Br. 49. So ultimately it cannot

matter that respondents object to only some, and not all, contraceptives.[2]

3. Respondents contend (Br. 50) that "exceptions" to the contraceptive-coverage provision "undermine any claim that the government's interests are compelling." As respondents' amicus Eugene Volokh has explained, however, the presence of statutory "exceptions" has never been seen "as casting doubt on the strength of the government's interests" in a free-exercise case. *4B. RFRA Strict Scrutiny: The Argument from Secular Exceptions*, The Volokh Conspiracy (Dec. 5, 2013), http://www.volokh.com/2013/12/05/4b-rfra-strict-scrutiny-argument-secular-exceptions/. "Nearly all important laws * * * have a large set of exceptions. Those laws, even when they serve compelling interests, leave appreciable damage to the interests unprohibited. Yet this can't mean that religious exemptions must be granted from such laws." *Ibid.* (discussing exceptions in laws governing taxes, the draft, statutory rape, contract, and copyright); see Gov't Br. 52, 54-55.

Given the ubiquity of statutory exemptions, respondents' argument, if accepted, would entitle commercial employers with religious objections to opt out

---

[2] Respondents refer to the drugs and devices to which they object as "abortifacients," *e.g.*, Resp. Br. 15, and their religious view of what constitutes abortion is of course entitled to respect. Nonetheless, as the government has explained, see Br. 10 n.4, these drugs and devices do not cause abortions within the meaning of longstanding federal law. As the Institute of Medicine explained, one benefit of access to all FDA-approved contraceptives is that they *reduce* the incidence of abortion. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 105 (2011); see 78 Fed. Reg. at 39,872.

of virtually every statute protecting their employees. Here are just a few examples:

- An employer that, "based on an interpretation of the Bible," believes it cannot hire a "single woman working without her father's consent" or "a person whose commitment to a non-Christian religion is strong," *McClure* v. *Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985), appeal dismissed, 478 U.S. 1015 (1986), would be entitled to a RFRA-based immunity from federal anti-discrimination laws because those laws include significant exceptions. See 42 U.S.C. 2000e(b) (Title VII exception for employers with fewer than 15 employees)[3]; 42 U.S.C. 2000e-1(a) (exception to Title VII's prohibition on religious discrimination for "religious corporation[s]" and similar entities).[4]

---

[3] Nearly 79% of firms that employed others in 2008 had nine or fewer employees, while more than 89% of those firms had 19 or fewer employees. See U.S. Census Bureau, U.S. Dep't of Commerce, *Statistics about Business Size (including Small Business)*, tbl. 2a (2008), https://www.census.gov/econ/smallbus.html.

[4] As *McClure* makes clear, this example is not hypothetical. Indeed, one of respondents' amici expressly urges the Court to use this case to resolve what it describes as the "growing conflict between religion and nondiscrimination principles" in favor of religion. See Liberty, Life, & Law Found. Amicus Br. 13. Similar arguments were recently advanced in favor of an amendment to Arizona's state-level RFRA, Ariz. Rev. Stat. Ann. §§ 41-1493 *et seq.* (2011); see S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), which was vetoed by the Governor. See Letter from Janice K. Brewer, Governor, State of Ariz., to the Hon. Andy Biggs, President of the Ariz. State Senate (Feb. 26, 2014), http://azgovernor.gov/dms/upload/PR_022614_SB1062VetoLtr.pdf. As counsel for respondents' amicus Christian

- RFRA could be invoked to furnish an exemption to an employer with a religious objection to compliance with minimum-wage or overtime laws, see *Alamo Foundation*, 471 U.S. at 303, because those laws do not apply to all employees or employers. See Office of the Assistant Sec'y for Policy, U.S. Dep't of Labor, *Fair Labor Standards Act Advisor: Exemptions*, http://www.dol.gov/elaws/esa/flsa/screen75.asp (last visited Mar. 5, 2014) (listing more than 40 exempt categories).

- An employer with a religious objection to paying Social Security taxes for its employees, see *Lee*, 455 U.S. at 255 & n.3, would also be entitled to a RFRA opt-out because there are numerous statutory exemptions to that obligation. See *id.* at 260 (discussing exemption for "self-employed Amish and others"); 26 U.S.C. 3121(b) (providing 21 exemptions from obligation to pay Social Security taxes, including for state and local governments and churches with religious objections).

Legal Society has explained, the vetoed Arizona bill would have expressly codified as a matter of state law respondents' interpretation of the federal RFRA, *i.e.*, an extension of free-exercise rights to all corporations and recognition of a RFRA defense in litigation between private parties. See David Bernstein, *Guest post from Prof. Doug Laycock: What Arizona SB 1062 actually said*, The Wash. Post (Feb. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/; see also Gov't Br. 43-45 (discussing court of appeals decisions holding that RFRA does not apply in litigation between private parties).

- An employer with religious objections to rubella or hepatitis immunizations,[5] would be entitled to a RFRA opt-out from the obligation to cover those recommended immunizations, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011), because the immunization-coverage provision (like the contraceptive-coverage provision) does not apply to grandfathered plans and because small employers can decline to offer any health coverage without risk of paying a tax.

A reading of RFRA that would produce this regime of virtually automatic exemptions from critical employee-protection legislation cannot be correct.

Even putting aside the overarching problem with respondents' argument, however, their specific contentions regarding what they call the "exceptions" (Br. 50) at issue here lack merit. Respondents contend (*ibid.*) that neither their employees nor the government can have a compelling interest in coverage of any preventive-health services (not only contraceptive coverage but also coverage for immunizations, colorectal cancer screening, domestic abuse counseling, and all other recommended preventive-health services) because grandfathered plans are not required to cover them. But if that is correct, then any time Congress does not compel an immediate switch to a complex new statutory regime, it eliminates the

---

[5] Liberty Counsel, which represented Liberty University in its attempt to challenge the contraceptive-coverage provision, see *Liberty Univ.*, 733 F.3d at 103-105, has raised religious objections to vaccines for varicella, hepatitis A, and rubella. See Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom* (2007), http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

compelling interests underlying the new regime. Respondents cite no support for that remarkable proposition.

Moreover, respondents admitted below that the Act's grandfathering provision is transitional in effect, see J.A. 39-40, and thus qualitatively different from the permanent exemption respondents seek. Asked by the district court why the Hobby Lobby group health plan did not have grandfathered status, respondents' counsel explained that the "grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing." *Ibid.* He emphasized that, "just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shift[] over time." J.A. 40. Respondents' amicus National Religious Broadcasters likewise acknowledges (Br. 28) that, "[g]iven the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the 'grandfather' exclusion is *de minimis* and transitory at best."

Respondents fare no better by observing (Br. 50-51) that small employers are exempt from the obligation to pay a tax if they do not provide health coverage and that the implementing agencies have exempted churches from the contraceptive-coverage provision. The government explains in its opening brief (at 51-53, 54-57) why neither feature of the Act or its implementation furthers respondents' RFRA claim. It would be unprecedented and counter-intuitive to hold that the existence of small-employer exemptions and accommodations for churches eliminates the government's

compelling interests in enforcing a statute against larger employers in the commercial world.

4. Finally, respondents contend (Br. 58) that "the government [should] pay for its favored contraceptive methods itself" as a less-restrictive means of accomplishing its objectives. The implementing agencies explained why use of a government-financed system in place of the employer-based one contemplated by Congress would be ineffective. See Gov't *Conestoga* Br. at 55-56. It would therefore not adequately "further[]" the government's interests. 42 U.S.C. 2000bb-1(b)(2).

There is an even more fundamental flaw in respondents' less-restrictive-means argument. On their theory, commercial employers could secure exemptions from the duty to provide a minimum wage, equal pay, health coverage of vaccines, or any other employee benefit, on the ground that the government could itself step in and directly provide the money or benefit to the employees. That mode of analysis has no support in any free-exercise or RFRA precedent. See Gov't Br. 57-58.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2014