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., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, and DARSEE LETT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 78 Fed. Reg. 39870, 39870 (July 2, 2013) (citing 42 U.S.C. § 300gg-13(a)(4)). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

RULE 29.6 DISCLOSURE

Respondent Hobby Lobby Stores is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Mardel is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondents David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett are individual persons.

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INTRODUCTION

On the merits, this is one of the most straightforward violations of the Religious Freedom Restoration Act this Court is likely to see. Respondents' religious beliefs prohibit them from providing health coverage for contraceptive drugs and devices that end human life after conception. Yet, the government mandate at issue here compels them to do just that, or face crippling fines, private lawsuits, and government enforcement. That is a textbook "substantial burden" on religious exercise under RFRA. Indeed, the government has effectively acknowledged this substantial burden by exempting countless non-profit entities with the same basic religious objection. And it has exempted plans covering tens of millions of people for reasons no more compelling than administrative convenience. Given these myriad exemptions, the mandate cannot possibly be the least restrictive means of achieving any compelling government interest—and it is certainly not some universal policy that cannot tolerate additional exemptions. If RFRA means anything, it means the government cannot hand out exceptions for secular reasons and then insist that "uniformity" forecloses similar exceptions for religious exercise. But the mandate does precisely that.

Understandably eager to avoid the merits, the government directs considerable effort to driving an artificial wedge between the corporate Respondents and their owners. But that distinction is illusory; *both* the corporations and their owners are entitled to relief under RFRA. Corporations frequently engage in religious exercise, as even the government concedes in

the case of non-profits, and no constitutional right turns on a corporation's tax status. Ultimately, whether it is the individuals, the corporations, or both who are exercising religion, the government cannot simply wish away the reality that its policies substantially burden Respondents' religious exercise in a wholly unjustified manner.

STATEMENT OF THE CASE

A. Statutory Background

1. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), provides that: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a). Upon showing a substantial burden, RFRA entitles a claimant to an exemption unless the government can satisfy strict scrutiny. That is, the government must prove that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). RFRA constrains all federal laws and regulations, unless Congress explicitly exempts them. *Id.* § 2000bb-3(a)-(b); see generally *Gonzales* v. *O Centro*, 546 U.S. 418 (2006).

RFRA directly responded to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (quotation marks omitted). In so holding, *Smith* declined to apply the strict scrutiny approach of cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and

Wisconsin v. *Yoder*, 406 U.S. 205 (1972). Through RFRA, Congress sought "to restore the compelling interest test * * * and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Congress determined this "compelling interest test * * * is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5). RFRA thus mandates "case-by-case consideration of religious exemptions" under strict scrutiny. *O Centro*, 546 U.S. at 436.

2. This dispute arises from a regulation promulgated under the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA").

The ACA is an exceptionally complex piece of legislation with many novel, overlapping mandates and exemptions. "The Act's 10 titles stretch over 900 pages and contain hundreds of provisions." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012) ("*NFIB*"). The ACA "requires most Americans to maintain 'minimum essential' health insurance coverage," which they may do through employer-based coverage, through Medicaid or Medicare, or by "purchas[ing] insurance from a private company." *Ibid*. In addition to this "individual mandate," the ACA also imposes an "employer mandate," which requires certain employers to provide "minimum essential" health coverage to employees. 26 U.S.C. § 4980H.

The ACA also contains new substantive requirements for group health plans. One category of mandatory benefits is women's "preventive care and

screenings," which must be covered without cost-sharing. 42 U.S.C. § 300gg-13(a)(4). Rather than defining this category, Congress delegated that authority to the Health Resources and Services Administration ("HRSA"), a sub-agency within HHS. HRSA, in turn, asked the Institute of Medicine ("IOM"), part of the "semi-private" National Academy of Sciences, "to develop recommendations to help implement these requirements." Pet.Br.5; Pet.App.9a-10a; see generally IOM, *Clinical Preventive Services for Women: Closing the Gaps* (2011) ("IOM Report"). In August 2011, HRSA adopted the IOM's recommendations without change. HRSA, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines.

The end result of this regulatory process is that "non-grandfathered [health] plans * * * generally are required to provide coverage without cost sharing" of "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[1] *Ibid.* "Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing

[1] FDA-approved methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini-pill, the continuous-use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. FDA, *Birth Control Guide* (May 2013), http://www.fda.gov/For Consumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. The contraceptive-coverage mandate does not include contraceptive methods for men. 78 Fed. Reg. 39870, 39870 n.1 (July 2, 2013).

the implantation of a fertilized egg."[2] Pet.App.10a. This requirement to cover FDA-approved drugs and devices is the contraceptive-coverage mandate at issue here.

The government has exempted a vast array of employers from this mandate for both religious and secular reasons. First, HHS recognized that the mandate would significantly impact religious believers. See 45 C.F.R. § 147.131(a) (authorizing "an exemption * * * with respect to a group health plan established or maintained by a religious employer * * * with respect to any requirement to cover contraceptive services"). Accordingly, it established exemptions for "religious employers," defined as non-profit organizations "described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order." Pet.App.11a-12a; see 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

Second, HHS has provided an "accommodation" for other religious non-profit organizations whose religious beliefs prevent them from complying with all or part of the mandate, allowing them to route

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[2] As it has throughout this litigation, the government concedes that the drugs and devices at issue can prevent uterine implantation of an embryo. See Pet.Br.9 n.4 (conceding that Plan B (levonorgestrel), Ella (ulipristal acetate) and copper IUDs like ParaGard may act by "preventing implantation (of a fertilized egg in the uterus)"; *ibid.* (admitting that IUDs with progestin "alter[ ] the endometrium"); see also FDA, *Birth Control Guide*, *supra*. The en banc Tenth Circuit found "no material dispute" on this issue. Pet.App.10a n.3.

contraceptive payments through their insurer or plan administrator. 45 C.F.R. § 147.131(b).[3]

Third, wholly apart from any religious concerns and for the sake of administrative convenience, "grandfathered" plans may indefinitely avoid the mandate by not making certain changes after March 2010. See 42 U.S.C. § 18011(a)(2) ("Preservation of right to maintain existing coverage"). This exemption has no time limit, allows the addition of new employees, and is keyed to medical inflation. 42 C.F.R. § 147.140(a)-(b), (g). While grandfathered plans must comply with certain other ACA requirements—such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods, 42 U.S.C. § 18011(a)(4); 75 Fed. Reg. 34538, 34542 Tbl. 1 (June 17, 2010)—grandfathered plans need not cover contraceptives or any other women's preventive service. 75 Fed. Reg. at 34540.

Fourth, small businesses with fewer than fifty employees—96% of all firms in the United States—are exempt from the ACA requirement that employers provide health insurance to their employees.[4] Small

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[3] Hundreds of non-profit religious organizations have challenged the "accommodation," and in nineteen out of twenty decided cases it has been enjoined. Reply Br.3-4 nn.2-3, *Little Sisters of the Poor* v. *Sebelius*, No. 13A691 (U.S. Jan. 3, 2014) (collecting cases); Order, *Little Sisters*, No. 13A691 (Jan. 24, 2014) (enjoining accommodation pending appeal).

[4] 26 U.S.C. § 4980H; *The Affordable Care Act Increases Choice and Saving Money for Small Business*, WhiteHouse.Gov 2, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

businesses can thus avoid the mandate and any penalty by not providing insurance to their employees.

Based on the government's own estimates, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a; see also, *e.g.*, 75 Fed. Reg. at 34552 Tbl.3 (55% of large employer plans would retain grandfathered status in 2013); Pet.Br.53 (36% of Americans covered through their employers were in grandfathered health plans in 2013).

The government, however, has refused to provide any exemption for for-profit entities and their owners who object on religious grounds to providing the mandated contraceptives. 78 Fed. Reg. 39870, 39875 (July 2, 2013) (noting that exemption does not apply to for-profit employers).

B. Factual Background

1. Respondents are David and Barbara Green; their children, Steve Green, Mart Green, and Darsee Lett; and their family businesses, Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores.[5]

Founded in 1970 by David Green, Hobby Lobby has grown from a single arts-and-crafts store in Oklahoma City into a nationwide chain with over 500 stores and more than 13,000 full-time employees. In 1981, Mart Green founded Mardel, an affiliated chain of Christian bookstores, which now has thirty-five

[5] In this brief, "the Greens" refers collectively to the Green family members. "Respondents" refers collectively to the Greens, Hobby Lobby, and Mardel. The undisputed material facts are taken from Respondents' Verified Complaint. JA124-69.

stores and about 400 full-time employees. Hobby Lobby and Mardel remain closely held family businesses, organized as general corporations under Oklahoma law, and exclusively controlled by the Greens. JA129-30, 134. David Green is Hobby Lobby's CEO, his son Steve is President, his daughter Darsee is Vice President, and his son Mart is Vice CEO of Hobby Lobby and CEO of Mardel. JA129-30. For federal tax purposes, Hobby Lobby is a subchapter-S corporation. Pet.App.7a-8a.

2. "The Greens have organized their businesses with express religious principles in mind." Pet.App.8a. Hobby Lobby's official statement of purpose commits the company to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." JA134-35. The Greens operate Hobby Lobby and Mardel through a management trust they created, of which each Green is a trustee. Pet.App.8a; JA129-30, 134. The Greens each signed a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs, to "honor God with all that has been entrusted" to them, and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA134.

"[T]he Greens allow their faith to guide business decisions for both companies." Pet.App.8a. All Hobby Lobby stores close on Sundays, at a cost of millions per year, to allow employees a day of rest. Each Christmas and Easter, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *E.g.*, *Easter 2013*

Advertisement, http://www.hobbylobby.com/assets/images/holiday_messages/messages/2013e.jpg. Store music features Christian songs. Employees have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. And company profits provide millions of dollars every year to ministries. Pet.App.8a; JA134-39. Mardel primarily sells Christian materials and describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." Pet.App.8a; JA137-38.

Respondents also refrain from business activities forbidden by their religious beliefs. For example, to avoid promoting alcohol, Hobby Lobby does not sell shot glasses. Hobby Lobby once declined a liquor store's offer to take over one of its building leases, costing it hundreds of thousands of dollars a year. Similarly, Hobby Lobby does not allow its trucks to "back-haul" beer and so loses substantial profits by refusing offers from distributors. Pet.App.8a; JA136.

In the same way, Respondents' faith affects the insurance offered in Hobby Lobby's self-funded health plan. Respondents believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion. Pet.App.50a-51a. Hobby Lobby's health plan therefore excludes drugs that can terminate a pregnancy, such as RU-486. The plan likewise excludes four drugs or devices that can prevent an embryo from implanting in the womb—namely, Plan B, Ella, and two types of intrauterine devices. Indeed, when Respondents discovered that two of these drugs

had been included—without their knowledge—in the plan formulary, they immediately removed them. Pet.App.174a.

3. Respondents' religious beliefs will not allow them to do precisely what the contraceptive-coverage mandate demands—namely, provide in Hobby Lobby's health plan the four objectionable contraceptive methods. But the government makes non-compliance costly. The statute imposes a fine of $100 per day for each "individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). Because Respondents' plan covers over 13,000 individuals, this fine could amount to over $1.3 million per day or nearly $475 million per year. Pet.App.15a; JA154. In addition, the Labor Department and private plaintiffs may sue Respondents for failure to provide all FDA approved contraceptive methods. 29 U.S.C. § 1132.

If Respondents instead ceased providing any health insurance to their employees, they would owe a lower but still substantial penalty of $26 million per year, see 26 U.S.C. § 4980H, and would face severe disruption to their business. Dropping insurance would place them at a competitive disadvantage, and hobble their employee recruitment and retention efforts. Pet.App.51a; JA153. It would also harm the employees who currently depend on Hobby Lobby's generous health insurance—and would undermine Respondents' desire to provide health benefits for their employees, which is itself religiously motivated. *Ibid.*

Despite their sincere religious objections to facilitating abortion, Respondents do not qualify for any exemption from the mandate. Having altered

their plan terms before the mandate was promulgated, Hobby Lobby's health plan is not "grandfathered," Pet.App.14a; JA140, and with well over 50 employees, they must offer qualifying insurance. 26 U.S.C. § 4980H. As for-profit businesses, neither Hobby Lobby nor Mardel is covered by the religious employer exemption or the accommodation. Pet.App.13a-14a. Consequently, Respondents must either violate their faith by covering the mandated contraceptives, or subject their family businesses to crippling consequences.

C. Procedural History

1. On September 12, 2012, Respondents sued in the United States District Court for the Western District of Oklahoma, challenging the mandate under RFRA, the First Amendment, and the Administrative Procedure Act, 5 U.S.C. § 553. See JA128. They simultaneously moved for a preliminary injunction, JA9, which the district court denied. The court held that Hobby Lobby and Mardel, as for-profit corporations, have no free exercise rights and thus are not "persons" under RFRA. Pet.App.188a. Additionally, the court concluded that the Greens individually could not show a "substantial burden" on their religious exercise, because the mandate's burden on them was only "indirect and attenuated." Pet.App.194a.

2. The Tenth Circuit granted initial en banc hearing and reversed. Pet.App.5a, 16a. By a 5-3 majority, the en banc court held that Hobby Lobby and Mardel were "persons" capable of religious exercise and could therefore sue under RFRA. Pet.App.24a (interpreting 42 U.S.C. § 2000bb-1(a)). The en banc

court also rejected the government's argument that RFRA excludes religious exercise by for-profit corporations. Pet.App.33a. Additionally, four judges found that the Greens could sue individually under RFRA. Pet.App.78a (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); *id.* 162a (op. of Matheson, J.).[6]

The en banc court next held that Hobby Lobby and Mardel were likely to succeed on their RFRA claim. The court first recognized Respondents' sincere religious belief (which the government did not dispute) that providing the mandated coverage would make them morally complicit in abortion. Pet.App.50a-51a. The court then held that the mandate imposed a "substantial burden" on Respondents' exercise of religion because it pressured them to violate that belief. Pet.App.50a-51a. Because the mandate forced Respondents to either "compromise their religious beliefs," "pay close to $475 million more in taxes every year, or pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial." Pet.App.51a-52a.

The court rejected the government's argument that the burden on Respondents was too attenuated,

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[6] These four judges rejected the government's argument based on the prudential "shareholder standing rule" because that rule "does not bar corporate owners from bringing suit if they have 'a direct and personal interest in a cause of action.'" Pet.App.86a (quoting *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)); *id.* 161a (same). As explained below, the government has abandoned its shareholder standing argument. See *infra* n.15.

and therefore insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer. Pet.App.54a-56a. The court found this reasoning "fundamentally flawed," because it "requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." Pet.App.44a.

The court then concluded that the mandate failed strict scrutiny. The government's asserted interests in "public health and gender equality" were not compelling "because they are 'broadly formulated,'" because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants,'" and because "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.57a-58a (quoting *O Centro*, 546 U.S. at 431). The court also held that the mandate was not the least restrictive means of achieving those over-broad interests because the government did "not articulate why accommodating [Respondents'] limited request fundamentally frustrates its goals." Pet.App.60a.[7]

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act protects Respondents' religious exercise. RFRA covers any "person's exercise of religion," 42 U.S.C. § 2000bb-1(a),

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[7] Because a majority did not resolve the remaining injunction factors, the court remanded. Pet.App.66a. Subsequently, the district court entered a preliminary injunction, which the government then appealed. Pet.Br.12. All lower court proceedings have been stayed pending this Court's disposition of the case. *Ibid*.

but it does not separately define "person." The Dictionary Act thus supplies the meaning of the term, which is specifically designed to include both natural persons (like the Greens) and corporations (like Hobby Lobby and Mardel). This understanding is supported by RFRA's context and this Court's jurisprudence, which has long protected the exercise of religion by corporations and in commercial contexts. Indeed, the government is forced to concede that RFRA applies to non-profit corporations and offers no support for the notion that a corporation's ability to exercise constitutional rights turns on its tax status. RFRA therefore clearly protects both the individual and the corporate Respondents. And the government's attempt to drive a wedge between the Greens and their businesses—where only the former have rights and only the latter suffer burdens—is a misguided shell game. The fact remains that the Greens exercise their faith through Hobby Lobby and Mardel, and those beliefs are entitled to protection under a statute that draws no distinction between natural or corporate persons, let alone between for-profit and non-profit corporations.

The contraceptive mandate substantially burdens Respondents' exercise of religion. Respondents' faith prohibits them from facilitating abortion, and specifically from providing health coverage for the four mandated drugs and devices that can end life after conception. The government does not dispute that these are sincere religious beliefs or that they deserve protection—indeed, the government accommodates the same religious beliefs of certain non-profit corporations. Yet, the mandate compels Respondents to do precisely what their religion prohibits or face

draconian consequences—including millions in fines, private lawsuits, and government enforcement actions. This is the paradigmatic substantial burden under RFRA. The government's attempt to re-characterize the mandate as concerned only with the exchange of money ignores the mandate's purpose and effect: to force employers to provide *specific* contraceptives. And the government's suggestion that the burden is too "attenuated" to warrant relief is just a backdoor effort to question the sincerity of Respondents' religious beliefs. Respondents object to being forced to facilitate abortion by providing abortifacients, and that objection does not turn on the independent decisions of their employees.

The government has not come close to carrying its burden of demonstrating that the mandate satisfies strict scrutiny. First, the government's articulated compelling interests are woefully deficient. Two—public health and gender equality—are defined so broadly that they could never satisfy strict scrutiny. There are countless less restrictive means to achieve these broadly defined goals without implicating Respondents' religious exercise. The third is newly minted for this Court, and is therefore forfeited. But that newly articulated interest—the promotion of a "comprehensive" scheme of providing benefits to all—actually highlights the most glaring problem with the government's defense of the mandate: the government has already granted a bevy of exceptions to the mandate, for reasons ranging from religious accommodation to administrative convenience. Having granted multiple exemptions for multiple reasons, the government cannot validly fall back on a compelling interest in comprehensiveness. This case

is the polar opposite of the social security system, where the government can credibly insist that everyone must contribute and even a modest exception for employers endangers the system. Indeed, if RFRA means anything, it makes crystal clear that when the government grants exceptions for secular reasons, it cannot insist on enforcing that law in the name of comprehensiveness when it substantially burdens sincerely-held religious beliefs.

ARGUMENT

I. The Religious Freedom Restoration Act Protects Respondents' Exercise Of Religion.

A. Both the Corporate and Individual Respondents Are "Persons Exercising Religion" Under RFRA.

1. RFRA protects any "person's exercise of religion." 42 U.S.C. § 2000bb-1(a), (b). Because RFRA does not specifically define "person," the Dictionary Act's definition of the term controls. See, *e.g.*, *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 275 (1947). The Dictionary Act provides that: "In determining the meaning of any Act of Congress, unless the context indicates otherwise, * * * the word[] 'person' * * * include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, as a matter of simple statutory interpretation, RFRA protects both the individual and corporate Respondents' religious exercise. This conclusion should "end the matter." Pet.App.24a.

Nothing else in RFRA suggests any limitation on the Dictionary Act's definition. When applying the Dictionary Act, the relevant "context" is "the text of

the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland* v. *Cal. Men's Colony*, 506 U.S. 194, 199 (1993). If anything, RFRA's context *confirms* that the Dictionary Act's broad definition controls. The statute contains no specialized or limited definition of "person," while it specifically defines other terms. See, *e.g.*, 42 U.S.C. § 2000bb-2(1)-(4) (defining "government," "covered entity," "demonstrates," and "exercise of religion"). And it defines "exercise of religion" capaciously to include "*any* exercise of religion." 42 U.S.C. § 2000bb-2(4) (cross-referencing Religious Land Use and Institutionalized Persons Act ("RLUIPA")); *id.* § 2000cc-5(7)(A)-(B) (emphasis added). What is more, the Dictionary Act includes all manner of artificial entities within its broad definition without so much as hinting that anything turns on their tax status. Indeed, religion is commonly exercised by and through corporations, associations, and societies—which, of course, is why the government rightly concedes that *non-profit* corporations come within RFRA's ambit.

Thus, no plausible reading of RFRA's text, context, and history would exclude Respondents from its protection. In fact, the congressional debates leading up to RLUIPA displayed an undisputed public understanding that the language in RFRA "protected for-profit corporations and their owners." Christian Legal Soc'y *Amicus* Br.32.

2. Congress knows how to limit statutory protections to a subset of artificial entities or "persons," and it chose not do so in RFRA. For instance, Congress expressly limited religious

exemptions in Title VII and the ADA to "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a); *id.* § 12113(d)(1), (2). "Congress [wa]s aware of" these limited exemptions, but "chose not to" employ such limited formulations in RFRA. *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, __ U.S. __, No. 12-1036, slip op. at 6-7 (U.S. 2014) (quoting *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012)). And when "Congress decline[s] to include an exemption," that "indicates that Congress intended no such exception." *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2134-35 (2012). Congress is thus "quite capable of narrowing the scope of a statutory entitlement * * * when it wants to," and it has chosen not to do so here. Pet.App.27a. That choice must be respected.

The government ignores this legislative choice. Indeed, one way to understand the flaws with the government's approach is that it attempts through regulation to accommodate only a subset of those entitled to a statutory exemption under RFRA. See *supra* p. 5 (describing narrowly-defined class of "religious employers"). But when Congress makes a broad accommodation for all persons whose religious exercise is substantially burdened, an agency is not free to offer a regulatory exemption only to a narrowly defined subset of such persons.

3. The government offers no contrary analysis of RFRA's text and context. Instead, it asserts that RFRA protects only "individuals and religious non-profit institutions" because no pre-*Smith* case held "that for-profit corporations have religious beliefs." Pet.Br.17, 18-19. But the place to look for the scope of RFRA's coverage is its text, which broadly protects

any religious exercise. RFRA does not offer only begrudging protection such that a plaintiff must identify a right to religious exercise clearly established by a pre-*Smith* holding. Accordingly, the burden of the government's argument is to establish that the exercise of religion by a for-profit corporation is such an oxymoron that Congress could not have included it when broadly protecting the religious exercise of all persons, including corporations.

In any event, far from holding that religion and commercial activity are incompatible, this Court's pre-*Smith* cases squarely recognized that religious exercise may legitimately occur in the sphere of for-profit business. In *United States* v. *Lee*, for instance, the Court addressed a claim by an Amish carpenter and farmer that "both payment and receipt of social security benefits is forbidden by the Amish faith." 455 U.S. 252, 254, 257 (1982). The Court concluded that compelling the employer to "participat[e] in the social security system interferes with [his] free exercise rights," despite the obvious for-profit nature of his business. *Id.* at 257. Similarly, in *Braunfeld* v. *Brown*, the Court entertained a challenge to a Sunday closing law by Orthodox Jewish "merchants * * * engage[d] in the retail sale of clothing and home furnishings." 366 U.S. 599 (1961). There, too, this Court recognized that the law burdened free exercise rights because it made "religious beliefs more expensive." *Id.* at 605. Although both laws ultimately withstood strict scrutiny, there was no doubt that the claimants were exercising their religious beliefs through for-profit commercial activities.

The government does not resist this conclusion but instead offers the fig leaf that *Lee* and *Braunfeld* involved "individual sole proprietors," rather than corporations. Pet.Br.18. This is a classic distinction without a difference. None of this Court's cases, before or after *Smith*, suggests that an entity's particular *form* determines whether it or its owners can exercise religion. To the contrary, the Court has unanimously recognized the free exercise rights of a "not-for-profit corporation organized under Florida law," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993); "a New Mexico corporation on its own behalf," *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973 (10th Cir. 2004), *aff'd*, *O Centro*, 546 U.S. 418; and an "ecclesiastical corporation," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012), *reversing EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010). This recognition dates back to the earliest decades of the Republic. In 1815, this Court explained that "the legislature may * * * enable all sects to accomplish the great objects of religion by giving them *corporate rights* for the manag[e]ment of their property, and the regulation of their temporal as well as spiritual concerns." *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.) (emphasis added).

Indeed, in *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U.S. 617, 618-19 (1961), five members of the Court assumed that a commercial corporation owned by four Orthodox Jewish shareholders could challenge a Sunday closing law under the Free Exercise Clause. The government's claim that *Gallagher* made an "express reservation" of

whether for-profit corporations can exercise religion simply misreads the decision. Pet.Br.18. Four Justices in *Gallagher* stated that, given the companion decision in *Braunfeld*, they "need not decide whether appellees have standing to raise these questions." 366 U.S. at 631 (op. of Warren, C.J., joined by Black, Clark, and Whittaker, JJ.). But the government overlooks the fact that five other Justices (Frankfurter, Harlan, Douglas, Brennan, and Stewart) *did* reach the question and concluded that the corporation was exercising religion by closing on the Jewish Sabbath.[8] See also Orthodox Union *Amicus* Br. 8-11; Ethics & Public Policy *Amicus* Br.16-20.

Finally, the government's restrictive approach to RFRA misconceives the statutory framework. Even setting aside that this Court's pre-*Smith* precedents support Respondents, RFRA "is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in

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[8] See 366 U.S. at 642 (noting that Justices Brennan and Stewart "are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion") (cross-referencing *Braunfeld*, 366 U.S. at 616 (dissenting opinions of Brennan and Stewart, JJ.)); see also *id.* at 631 (incorporating concurrence and dissent in *McGowan* v. *Maryland*, 366 U.S. 420 (1961)); *McGowan*, 366 U.S. at 520 (Frankfurter, J., concurring, joined by Harlan, J.) (noting the "restraint upon the religious exercise of Orthodox Jewish practicants which the [Sunday closing] restriction entails"); *id.* at 577 (Douglas, J., dissenting) (asserting that "[w]hen these laws are applied to Orthodox Jews, as they are in No. 11 [*Gallagher*] and No. 67 [*Braunfeld*] * * * their vice is accentuated," and that, "[i]f the Sunday laws are constitutional, *kosher markets are on a five-day week*")) (emphasis added).

those decisions." H.R. Rep. No. 103-88, at 7 (1993); see also S. Rep. No. 103-111, at 9 (1993). The statute restored "the compelling interest test as set forth in" this Court's pre-*Smith* case law. 42 U.S.C. § 2000bb(b)(1). But Congress never intended to restrict RFRA's protection only to the specific facts of those earlier cases. See, *e.g.*, H.R. Rep. No. 103-88, at 6-7 (noting "expectation" that courts would find "guidance" in pre-*Smith* cases but "neither approv[ing] nor disapprov[ing] of the result in any particular court decision"). Furthermore, in 2000, Congress specifically amended RFRA's definition of "religious exercise" to eliminate its prior reference to the Free Exercise Clause and instead cross-referenced the broader definition from RLUIPA protecting "any exercise of religion." See Ethics & Public Policy *Amicus* Br.6-11. RFRA review, in other words, is not like review in the qualified immunity or federal habeas contexts, which require clearly established federal law controlling the case at hand. The scope of RFRA is answered instead by the statutory text, which covers all persons, including corporations, without regard to their tax status.

B. Free Exercise Rights, Like Most Constitutional Protections, Extend to For-Profit Corporations and Their Owners.

This Court has long held that corporations enjoy the full panoply of rights protected in the Constitution, except for those that are "purely personal." And the Court has never suggested that free exercise rights are purely personal, or that individuals could not exercise religion when engaged in particular activities (like

making money) or when using particular means (like a corporation). The government does not dispute any of this. Instead, it seeks to drive a wedge between the Greens and their businesses, and proposes another distinction—found nowhere in RFRA, the Constitution, or this Court's decisions—between non-profit and for-profit corporations. But the federal tax code does not decide the scope of constitutional rights, and the government's baseless proposal would lead to all manner of absurd results.

1. It is firmly rooted in this Court's jurisprudence that the First Amendment, like most other constitutional provisions, protects corporations and their owners. For over a century, it has been "well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978). Consequently, corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause, and section 1983,[9] and have been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments.[10] C12 *Amicus* Br.12-13.

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[9] See *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927) (Equal Protection Clause) (collecting cases); *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889) (Due Process Clause); *Monell*, 436 U.S. at 687-88 (section 1983).

[10] See, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Servs. Comm'n*, 447 U.S. 557, 566-68 (1980) (commercial speech); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) (unreasonable search), *overruled on other grounds by Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) (double jeopardy); *Pa. Coal Co.* v.

The government does not argue that religious exercise is a "purely personal" right that can be exercised only by individuals. *Compare First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978) (Fifth Amendment privilege against compelled self-incrimination is "purely personal"). Nor could it, since "[i]t is beyond question that associations—not just individuals—have Free Exercise rights." Pet.App.34a. This Court has explained that an individual's "freedom to speak, *to worship*, and to petition the government * * * could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Indeed, a great many of this Court's free exercise decisions have protected groups, not individuals. See *supra* p. 20 (citing *Hosanna-Tabor; O Centro*; *Lukumi*).

The history of the Free Exercise right confirms that religious activity has been routinely undertaken through corporations. In his *Commentaries on the Law of England*, Blackstone lists "advancement of religion" *first* in the list of purposes that corporations might pursue. 1 *Blackstone Commentaries on the Law of England* ch. 18 ("Of Corporations") 467; see also Christian Booksellers *Amicus* Br. 12-13. Indeed, "religious institutions * * * had long been organized as

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Mahon, 260 U.S. 393, 415 (1922) (takings); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 73, 76-77 (1908) (right to criminal jury); *Ross* v. *Bernhard*, 396 U.S. 531, 532-33 (1970) (right to civil jury); *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001) (protection from excessive fines).

corporations at common law and under the King's charter * * *." *Citizens United* v. *FEC*, 558 U.S. 310, 388 (2010). There is no reason to ignore this history or contort the statutory text to hold otherwise.

Moreover, the government's insistence that one kind of corporation does not "have" religious exercise rights fundamentally misunderstands this Court's approach. In *Bellotti*, the Court explained that "[t]he proper question * * * is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776; see also *Citizens United*, 558 U.S. at 342-43 (an activity "does not lose First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti*, 435 U.S. at 784). Under *Bellotti*, it cannot possibly be right to ask whether for-profit corporations "have" free exercise rights, in contrast to other entities organized in different forms or under separate provisions of the tax code. The question is simply whether the law burdens religious exercise. Here, the government's own actions leave no doubt that the answer is plainly yes: it has exempted churches and other entities for precisely the same religious exercise Respondents raise in this case.

2. The government's proposed distinction between the religious exercise of for-profit and non-profit corporations fails for similar reasons. Most obviously, the distinction appears nowhere in RFRA's text or the Dictionary Act. There is simply no reason to believe Congress intended the unadorned term

"person" in RFRA to include individuals, non-profit corporations, and profit-making enterprises (provided they are organized as something other than a corporation), but to exclude for-profit corporations. And the Dictionary Act does not exclude for-profit corporations from its capacious definition of "person."

Moreover, the government's profit-based approach to religious exercise conflicts with this Court's First Amendment cases, which do not turn on a claimant's tax status. This is true not only for religious exercise (as *Lee* and *Braunfeld* demonstrate), but also for the speech, press, and establishment clauses. See, *e.g.*, *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement"); *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) ("While the burdened speech results from an economic motive, so too does a great deal of vital expression."); *Larkin* v. *Grendel's Den, Inc.,* 459 U.S. 116, 117 (1982) (holding, under the Establishment Clause, that the state may not delegate power over liquor licenses to churches).[11]

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[11] This Court's commercial speech cases do not turn on the identity or tax status of the speaker, but on the nature of the speech in question. Thus the New York Times may *sometimes* engage in commercial speech (i.e., when it is selling subscriptions) but engages in noncommercial speech when it is editorializing. Even this Court's Commerce Clause decisions do not turn on corporate form or tax status of the actor, but on the nature of the activity. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 586 (1997) (rejecting "any categorical distinction between the activities of profit-making

Nor does the government offer any support for the odd notion that the First Amendment singles out religious exercise as the *only* right that may not be exercised while earning a living. Instead, the government offers only the false dichotomy that "[f]or-profit corporations are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." Pet.Br.19 (quotation marks omitted).[12] But corporations frequently pursue moral or religious goals alongside profits. See generally Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 Geo. Mason L. Rev. 59 (2013); Christian Booksellers *Amicus* Br.14-20; Council for Christian Colleges *Amicus* Br.13-19.[13] "States do not generally require for-profit corporations to reject all goals that do not maximize revenues," Twenty States *Amicus* Br.17, and for good reason: that would impermissibly condition basic constitutional freedoms on satisfying the tax code's definition of a non-profit. See *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a

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enterprises and not-for-profit entities" as "wholly illusory" for Commerce Clause purposes).

[12] Nor can the government derive this principle from Justice Brennan's concurrence in *Corporation of Presiding Bishop* v. *Amos* (PetBr.19), which acknowledged that some "for-profit activities could have a religious character." 483 U.S. 327, 345 & n.6 (1987).

[13] See also, Dustin Volz & Sophie Novack, *Why CVS is Ready to Lose Billions and Stop Selling Cigarettes* (Feb. 5, 2014), http://www.nationaljournal.com/health-care/why-cvs-is-ready-to-lose-billions-and-stop-selling-cigarettes-20140205 ("Put simply, the sale of tobacco products is inconsistent with our purpose.").

basis that infringes on his constitutionally protected interests"). Indeed Oklahoma, where Respondents are incorporated, recognizes that general corporations may undertake any "lawful acts," including acts inspired by religious belief. Okla. *Amicus* Br.3-11.

3. Without any foothold in text, context, or history, the government seeks to artificially divide Respondents, suggesting that only the Greens have religious rights but only their businesses suffer the burden of the mandate. Allowing *any* Respondent to sue under RFRA, it says, would wrongly "impute" the Greens' religious beliefs to their businesses and thus "reject the bedrock principle that a corporation is legally distinct from its owners." Pet.Br.25. But neither the law nor the government's own logic recognizes this division between the Greens and their family businesses.

The unremarkable principle that a corporation is "distinct" from its owners for some purposes does not permit the government to divide and conquer Respondents so that their religious rights simply vanish. The government concedes that RFRA and the First Amendment protect "religious non-profit institutions," Pet.Br.18-19, which are often organized in the corporate form. Non-profit corporations are just as "legally distinct" from their individual members as any for-profit corporation. See, *e.g.*, 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 25 ("The distinctness of the corporate entity applies equally to all kinds of corporations," and "nonprofit corporations * * *, like other corporations, are legal entities separate from their members"). Yet no one has ever dreamed that a non-profit corporation

can be burdened because only its individual members actually exercise religion. In short, whether an entity exercises religion "cannot be about the protections of the corporate form," since "[r]eligious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights." Pet.App.38a. Furthermore, RFRA—which protects a "person's exercise of religion," without qualification—does not even hint that it depends on the nuances of corporate structure at all.

The government incorrectly relies on decisions involving federal statutes that—unlike RFRA—expressly turn on corporate structure. See Pet.Br.24-25. Those cases, and the statutes at issue, distinguish themselves. *Cedric Kushner Promotions, Ltd.* v. *King*, involved a RICO provision that "foresees two separate entities, a 'person' and a distinct 'enterprise.'" 533 U.S. 158, 160 (2001); see also 18 U.S.C. § 1962(c) ("unlawful for any person employed by or associated with any enterprise * * * to conduct or participate * * * in the conduct of such enterprise's affairs" by committing certain crimes). The Court simply found sufficient "distinctness" between a corporation and its owner to apply RICO. *Cedric Kushner*, 533 U.S. at 163. Similarly, *Domino's Pizza, Inc.* v. *McDonald* involved 42 U.S.C. § 1981, which specifically protects a person's right to "make and enforce contracts" without regard to race. 546 U.S. 470, 474 (2006). The Court held the corporation's sole shareholder could not sue under the statute because the contractual rights at issue belonged to the corporation only. *Id.* at 477. But this Court did *not* hold that the corporation was unable to enforce its rights, even if it did so at the direction of the sole shareholder. See *id.* at 473 n.1

("[T]he Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims."). And, even farther afield, *United States* v. *Bestfoods*, 524 U.S. 51 (1998), does not involve the distinction between a corporation and its shareholders, but rather "the principle that a parent corporation is distinct from its subsidiaries." Pet.Br.25. More fundamentally, none of these cases relies on the corporate form to strip *both* individual *and* corporation of the relevant statute's rights or liabilities.

4. Nor is the government correct that the Greens *themselves* cannot sue under RFRA simply because they exercise their religion through for-profit corporations. Pet.Br.26-31. This flatly contradicts the statutory text and the actual facts of this case. RFRA broadly protects "any" religious exercise, and does not purport to limit the choice of means by which believers may exercise their faith. *Cf. M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.").

It is undisputed that the Greens have committed themselves to conducting their business activities according to their religious beliefs. See, *e.g.*, Pet.App.8a. Hobby Lobby and Mardel are closely-held corporations controlled entirely by the Greens. JA129-30, 134; Pet.App.7a-8a. Thus, Hobby Lobby and Mardel act only through the Greens. The record amply demonstrates how the Greens have pursued their religious commitments through their business activities, Pet.App.8a, and there is no dispute about the precise religious exercise at issue here: the Greens

cannot in good conscience direct their corporations to provide insurance coverage for the four drugs and devices at issue because doing so would "facilitat[e] harms against human beings." Pet.App.14a.

Thus, forcing Respondents to comply with the mandate would directly burden the Greens' religious exercise. Threats against one's business and livelihood—like threats against one's home, bank account, or unemployment check—can obviously impose unbearable pressure. Here, the devastating consequences for non-compliance will be visited upon the *Greens*' family businesses, and will occur only if the *Greens* continue to exercise their faith by excluding four products from their companies' health plan.[14]

The unavoidable result of the government's argument is that "an individual operating for-profit retains Free Exercise protections but an individual who incorporates * * * does not, even though he engages in the exact same activities as before." Pet.App.38a. That approach would produce absurd results. For example, the government agrees that a Jewish *individual* could exercise religion while operating a kosher butcher shop as a sole proprietor. See Pet.Br.18. Presumably, he could continue to exercise religion if he formed a general partnership

[14] The government is also wrong to suggest that Respondents' position would allow "any human resources manager" to seek an exemption under RFRA for the entire company. Pet.Br.30. A human resources manager might seek a Title VII accommodation from his employer if asked to violate his beliefs, but would have no RFRA claim against the government to exempt the entire company he works for.

with his brother. But the government says the ability of this religiously-observant butcher to exercise his faith abruptly ends—and the government's power to override his faith begins—at the moment of incorporation, "even though he engages in the exact same activities as before." Pet.App.38a. That rule is found nowhere in RFRA, the Dictionary Act, or this Court's decisions.[15]

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Both the Greens and their businesses can sue under RFRA. Indeed, they are indistinguishable for purposes of this case: Hobby Lobby and Mardel will comply with the mandate only if the Greens, and no one else, direct them to do so. But in all events the government cannot possibly be correct that *neither* the Greens *nor* their businesses can sue under RFRA, based on the specious reasoning that only the flesh-and-blood Greens can exercise religion while only the "corporate entity" can suffer the mandate's burdens. That shell game defies both law and logic.

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[15] In passing, the government alludes to the "shareholder standing rule," a prudential rule barring shareholder claims purely derivative of a corporation's claims. Pet.Br.28; see, *e.g.*, *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). But the government does not raise the prudential shareholder standing bar in this Court, and it forfeited the argument below. See, *e.g.*, Pet.App.83a (op. of Gorsuch, Kelly, and Tymkovich, JJ.). And in all events, the shareholder standing rule does not apply because the mandate "requires [the Greens] * * * directly and personally * * * to take *affirmative action* contrary to their religious beliefs." *Id.* at 161a (op. of Matheson, J.); see also *id.* at 86a (op. of Gorsuch, Kelly, and Tymkovich, JJ.); *Korte* v. *Sebelius*, 735 F.3d 654, 668-69 (7th Cir. 2013) (same).

It also has dangerous implications. For instance, if the government were correct, then a non-profit religious corporation could be denied a land-use permit, and the government could say the burden falls only on the corporate entity, not on its members. The government could equally say that only the editors of the New York Times can truly exercise free speech rights, and so the First Amendment is unconcerned with defamation liability for the corporate entity. Businesses owned by women and minorities could face discrimination, and neither the owners nor their companies could seek protection. On the flip-side, the government's argument would allow a corporate defendant to deny religious or racial discrimination on the ground that the corporate entity terminated employment and any animus flowed only from the controlling shareholder.

In any of those contexts, the government's argument would be a non-starter. It should fare no better here. A corporation's status as a distinct entity with limited liability does not render its rights or its owners' rights invisible to the First Amendment and federal civil-rights laws.

II. The Mandate Violates Respondents' Rights Under RFRA.

The contraceptive-coverage mandate violates Respondents' RFRA rights. RFRA requires the government to justify actions that "substantially burden" religious exercise by demonstrating that the specific burden is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The mandate substantially burdens Respondents' religious exercise by coercing

them—under threat of multi-million dollar fines—to violate their sincere belief that they cannot provide the four drugs and devices at issue. Indeed, the government itself understands the mandate's profound impact on believers, which is why it exempts certain religious groups, including some that have incorporated, from the mandate. The government's willingness to exempt others—and many for reasons as mundane as administrative convenience—dooms its efforts to meet strict scrutiny. The contraception mandate is the very antithesis of the kind of rigorously uniform requirement which admits no exceptions. And RFRA makes plain that the willingness to make exceptions for secular reasons estops the government from refusing to alleviate substantial burdens on sincere religious beliefs.

A. The Mandate Substantially Burdens Respondents' Exercise of Religion.

The substantial burden inquiry proceeds in two logical steps. The Court first must identify the sincere religious exercise at issue. Then, it must determine whether the government has placed substantial pressure on the plaintiff to abstain from that religious exercise. See, *e.g.*, *Korte* v. *Sebelius*, 735 F.3d 654, 682-85 (7th Cir. 2013); *Gilardi* v. *HHS*, 733 F.3d 1208, 1216-18 (D.C. Cir. 2013); Pet.App.50a-51a; see also *O Centro*, 546 U.S. at 428; *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981); see generally U.S. Conference of Catholic Bishops *Amicus* Br.15-32 (describing substantial burden analysis). Only the second step is at issue here.

1. Respondents' religious beliefs prohibit them from providing coverage for contraceptives that risk

destroying a human embryo. As the government concedes, the mandate coerces Respondents to do just that, by requiring them to cover four types of contraceptives that may prevent uterine implantation of an embryo. See Pet.Br.9 n.4; see also Pet.App.10a n.3 ("no material dispute" on this issue). In Respondents' view, offering these items in their health plan makes them complicit in abortion. See JA127, 139 (Respondents cannot "participat[e] in, provid[e] access to, [or] pay[ ] for * * * abortion-causing drugs and devices," including "deliberately providing insurance coverage for * * * [such] drugs or devices"). Thus, Respondents' objection under RFRA is to the mandate's requirement that they provide these specific drugs in Hobby Lobby's health plan, in violation of their faith. See, *e.g.*, Pet.App.53a ("Hobby Lobby and Mardel have drawn a line at providing coverage for drugs or devices they consider to induce abortions."). And the government concedes that these beliefs are "sincere" and "entitled to respect." Pet.Br.32.

Respondents' unwillingness to facilitate acts they regard as immoral is plainly an "exercise of religion" under RFRA.[16] See 42 U.S.C. § 2000cc-5; 2000bb-2(4) ("exercise of religion" under RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). This Court has recognized that religious exercise often involves "abstention from * * * physical acts." *Smith*, 494 U.S. at 877; see also *Thomas*, 450 U.S. at 715. And Respondents' belief that their religion draws a moral

[16] See 38 Protestant Theologians' *Amicus* Br.24-25; 67 Catholic Theologians' *Amicus* Br.2-3; Orthodox Union *Amicus* Br.5-6.

line at providing insurance coverage is not open to judicial re-examination. The government acknowledges this much, see Pet.Br.32 (citing *Thomas*)), as indeed they must, given that they have recognized the profound impact the mandate has on some believers by offering exemptions to entities with precisely the same objection as Respondents. See, *e.g.*, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

2. Given the draconian penalties for non-compliance, there can be no doubt that the mandate substantially burdens Respondents' exercise of religion. Indeed, the mandate and its multi-million dollar enforcement penalties are the paradigmatic substantial burdens.

A law substantially burdens religious exercise when it pressures a believer to forego a religious practice or violate a religious belief. And this Court has identified "substantial burdens" in far less onerous circumstances than these. In *Sherbert* and *Thomas*, for instance, the Court found such pressure in the unavailability of unemployment benefits. See *Sherbert*, 374 U.S. at 404 (concluding "the pressure upon [a Seventh-day Adventist] to forego [abstaining from Saturday work] is unmistakable"); *Thomas*, 450 U.S. at 717-18 (law's "coercive impact * * * put[ ] substantial pressure on [a Jehovah's Witness] to modify his behavior and to violate his beliefs" by participating in manufacturing tanks). Even though the compulsion was indirect, this Court held that "the infringement upon free exercise [wa]s nonetheless substantial." *Id.* at 718.

But "a fine imposed" for adherence to religious beliefs is as direct and obvious a burden as one could

imagine. *Sherbert*, 374 U.S. at 404. Fining someone for an act or omission compelled by faith is the paradigmatic substantial burden against which all other less direct impositions are compared. Thus, *Yoder* found a "severe" and "inescapable" burden where a law "affirmatively compel[led]" Amish parents to send their children to high school, or else be "fined the sum of $5 each." 406 U.S. at 208, 218. Similarly, *Lee* found a law "interfere[d] with * * * free exercise rights" by compelling an Amish carpenter to participate in the social security system against his beliefs or face a $27,000 tax assessment. 455 U.S. at 257; see also, *e.g.*, *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (*Lee* involved a "substantial burden").[17]

The penalties imposed by the mandate make *Yoder*'s $5-per-child penalty look quaint. If Respondents continue to offer their current health plan, which comports with their religious beliefs but not the mandate, Respondents face fines of $100 per

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[17] The Tenth Circuit correctly held that government substantially burdens religious exercise if, *inter alia*, it "places substantial pressure on an adherent * * * to engage in conduct contrary to a sincerely held religious belief." Pet.App.45a (citing *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). Other circuits have adopted similar formulations. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council,* 706 F.3d 548, 555-56 (4th Cir. 2013). In contrast, the Seventh Circuit has held that a substantial burden "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise * * * effectively impracticable." *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The Tenth Circuit declined to follow this formulation, Pet.App.56a n.18, as have other circuits. See, *e.g.*, *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

affected individual per day, which could total "over $1.3 million per day, or close to $475 million per year." Pet.App.51a; 26 U.S.C. § 4980D; JA126 (over 13,000 full-time employees). If Respondents drop insurance altogether, they would face annual penalties of $2,000 per employee, or more than $26 million, 26 U.S.C. § 4980H, and "put themselves 'at a competitive disadvantage in [their] efforts to recruit and retain employees," while undermining their faith-based interest in providing adequate benefits. Pet.App.51a (quoting JA153). Additionally, failure to comply with the mandate would open Respondents to costly private lawsuits and government enforcement under ERISA. See 29 U.S.C. § 1132(a)(1), (2), (5). It is thus impossible "to characterize the pressure as anything but substantial." Pet.App.51a. Since the government "did not question the significance of th[is] financial burden," the court of appeals correctly found a substantial burden "as a matter of law." Pet.App.52a.

Finally, the government's insistence that the burden here is insubstantial is difficult to square with its own felt-need to alleviate the same burdens experienced by others. After all, religious objections to the mandate were no surprise. The government knew it was treading on sensitive territory when it imposed a mandate concerning topics as fraught with religious controversy as abortion and contraception. Recognizing the inevitability of religious conflict, the government exempted certain non-profit entities and accommodated others. Having done so, the government is poorly positioned to deny that the mandate imposes a substantial burden on Respondents too.

This is not to say that if the government accommodates some religious exercise it must accommodate all. Conceivably, the government could accommodate some religious objectors in particular circumstances and yet justify refusing to accommodate others with the same beliefs by satisfying strict scrutiny. But logically the government cannot accommodate the religious exercise of some while denying that the law substantially burdens others engaged in the exact same religious exercise.

3. The government offers no coherent response to this straightforward substantial burden analysis. Rather than follow this Court's actual guidance from *Thomas*, *Lee*, and other cases, it proposes a list of newfound "principles" that should "guide[]" the Court—such as whether the relationship between Respondents' injury and the mandate is "too attenuated," and whether their claims involve "actions and rights of independent actors and affected third parties." Pet.Br.32-33. Indeed, the closest the government comes to an actual standard is this masterpiece of obfuscation:

> [A] proffered burden may be deemed not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for, governmental programs that may offend his beliefs.

Id. at 33. This tortured standard has no mooring in RFRA's plain text or in this Court's pre-*Smith* cases

and is a far cry from *Yoder*'s simplicity, where a mandate and penalty were the quintessential substantial burden even when the fine was a mere $5.

The government's suggested guideposts and factors have no place in the substantial burden analysis. Indeed, to the extent they are relevant at all, they implicate distinct components of a RFRA claim. The government's "attenuation" concern, for example, is at best a backdoor effort to question the sincerity of Respondents' beliefs, which the government has wisely conceded. The major premise of its "attenuation" argument is that the burden is insubstantial because Respondents are merely required to "pay[ ] money into an undifferentiated fund to finance covered benefits" that employees may "independent[ly]" elect to use. *Ibid.* But that premise is incorrect. The mandate does not require the funding of health care accounts for whatever services the employee needs. It unambiguously requires Respondents to cover specifically-named items in their health plan. 42 U.S.C. § 300gg-13(a)(4) (authorizing HRSA to recommend "additional preventive care and screenings"). Indeed, the whole point of the mandate is to require cost-free coverage of *particular* services—a point the government recognizes in its brief. Pet.Br.50 ("Congress's objective [was] to increase access to recommended preventive services by eliminating all associated out-of-pocket costs.").

The balance of the government's "attenuation" argument simply ignores the nature of Respondents' religious-based objection and the government's own concession that the objection is sincere. Respondents object to the government's mandate that they provide

religiously-objectionable drugs and devices. It is irrelevant that the ultimate decisions to use the mandated drugs "are made by * * * plan participants and beneficiaries." Pet.Br.33. The government's suggestion otherwise misunderstands the nature of its own mandate and Respondents' religious objection. As the court of appeals correctly explained, "[i]t is not the employees' health care decisions that burden [Respondents'] religious beliefs, but the government's demand that Hobby Lobby and Mardel *enable access* to contraceptives that [they] deem morally problematic." Pet.App.53a (emphasis added). Put differently, Respondents have never filed suit regarding any decisions by their employees. Respondents sued only when the government forced Respondents to provide specific drugs and devices in violation of their faith.

The most fundamental problem, though, with the government's "attenuation" argument is that it invites "an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." Pet.App.44a. At bottom, the government insinuates that Respondents simply misapprehend their own beliefs because their employees' use of the objectionable items cannot be attributed to Respondents "in any meaningful sense." Pet.Br.33. But that is not how Respondents see it: they sincerely believe that *providing* the coverage makes them morally complicit. And that belief is not open to question here. See, *e.g.*, *Smith*, 494 U.S. at 887 ("[r]epeatedly * * * we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious

claim"); *Lee*, 455 U.S. at 256-57 ("[i]t is not within 'the judicial function and judicial competence' * * * to determine whether appellee or the Government has the proper interpretation of the Amish faith"); *Thomas*, 450 U.S. at 715-16 (because Jehovah's Witness "drew a line" against participating in tank manufacturing, "it is not for us to say that the line he drew was an unreasonable one"). It is not for the government to insist that Respondents' faith should have reached a conclusion more convenient for the government's regulatory goals.

The cases the government cites provide no support. *Tilton* v. *Richardson*, 403 U.S. 672 (1971), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), rejected free exercise challenges to tax dollars flowing to religious entities because, in both cases, the plaintiffs failed to identify any religious practice subject to government coercion. See *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249.[18] Quite obviously that is not true here. Respondents do not object to their tax dollars being used by the government to subsidize practices with which they disagree. They object to the government forcing *them* to facilitate such services directly or face draconian penalties. Similarly inapposite is the government's citation to *Bowen* v. *Roy,* 476 U.S. 693 (1986), which held that the government did not violate free exercise rights when it assigned a social security number to the plaintiff's child. There was no burden in *Bowen* because the

[18] Similarly, *Hernandez*, 490 U.S. at 700, merely suggested there was no burden on religious exercise where plaintiffs did not claim coercion but only that "an incrementally larger tax burden interferes with their religious activities."

challenged action did not "place[ ] any restriction on what [plaintiff] may believe or what he may do." *Id.* at 699. But *Bowen* was clear that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion." *Id.* at 700. Here we have the exact opposite of *Bowen*: the *government* seeks to dictate *private* conduct by compelling Respondents to offer religiously-objectionable services, a textbook substantial burden on religious exercise.[19]

The government's invocation of the effect on third-parties also has no place in the substantial burden inquiry. The substantial burden test quite obviously focuses on the burden to the objectors and their religious beliefs. The effect on others of allowing the religious objectors to opt out of a program is properly considered in evaluating whether the government has carried its burden under strict scrutiny, but it does not affect whether there is a substantial burden. Thus, folding concerns about "affected third parties," Pet.Br.33, into the substantial burden inquiry is a category mistake that improperly shifts the government's burden to the believer. Moreover, any relevant adverse impact on third parties must flow from allowing religious objectors to opt out of the otherwise comprehensive program. In a situation like this, where the government program forces one party

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[19] The government's reliance on *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), is also misplaced. *Zelman* upheld a school voucher program under the Establishment Clause; it says nothing about whether the mandate burdens Respondents' free exercise rights—let alone limits the "moral culpability for the religious believer[s]" to "the government's legal culpability in the Establishment Clause * * * context." Pet.App.55a.

to provide a benefit to another, the loss of that benefit is not the kind of impact on third parties that should matter. From the perspective of RFRA, a hypothetical government mandate that a person mow his lawn on Sundays should be analyzed no differently from a mandate that the same person mow his neighbor's lawn on Sundays. The fact that the neighbor loses free yard work in one scenario does not alter the substantial burden analysis in the least.

B. The Mandate Fails Strict Scrutiny.

The mandate does not satisfy strict scrutiny. Under RFRA, the government must prove that burdening the claimant's religious exercise is "the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (citing 42 U.S.C. § 2000bb-1(b)). This is "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), and the government cannot meet it here.

The government's asserted interests are woefully deficient. The interests identified in the lower courts—public health and gender equality—are overly general, when RFRA requires specificity. And the government's newly-identified interest in ensuring "a comprehensive insurance system," Pet.Br.38, is both forfeited and inapposite. In RFRA, Congress clearly wanted to vindicate religious exercise, even with respect to laws of general applicability. At the same time, the strict scrutiny standard recognizes that not all laws of general applicability are created equal. For a small subset of laws, like social security, the government may be able to show that its need for a truly comprehensive system means it cannot make an

exception even for what Congress has deemed the best of reasons. But the mandate with its manifold exemptions is not a law of general applicability, and it is the very antithesis of the kind of truly comprehensive program that can admit only minimal exceptions. When the government allows exceptions for all manner of reasons, including administrative convenience, RFRA makes crystal clear that the government cannot deny exemptions necessary to avoid a substantial burden on religious exercise.

1. The government has not established a compelling interest.

To demonstrate a compelling interest, the government must show that the mandate furthers interests "of the highest order." *Lukumi*, 508 U.S. at 546. This determination "is not to be made in the abstract" but "*in the circumstances of this case*." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 584 (2000). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994). RFRA requires specificity: the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). Thus, this Court will not find a compelling interest where the government has already granted broad exceptions under the law at issue. See, *e.g.*, *O Centro*, 546 U.S. at 433-34.

1. The government fails to meet this demanding burden. As it did below, the government argues that the mandate is the least restrictive means of advancing compelling interests in "public health and gender equality." Pet.Br.15, 46-51. But it makes no attempt to justify these "broadly formulated interests" with respect to the specific burden on Respondents' religious exercise, as RFRA requires. *O Centro*, 546 U.S. at 431. Nor could it. These compelling interests are at such a high level of generality that they defy meaningful application of strict scrutiny. While public health and gender equality are noble interests, they provide no better guidance in applying strict scrutiny than the equally noble interest in promoting the general welfare. There are countless other ways of promoting public health that would have little or no impact on anyone's religious exercise.

The government's reliance on general findings in the IOM Report does not save its public health argument. See Pet.Br.5. If anything, it undermines this asserted interest. Most fundamentally, the fact that the mandate derives from recommendations of the IOM—a "semi-private" organization—underscores that Congress did not deem a contraception mandate strictly necessary to promote public health, let alone consider the necessity of including the four specific drugs and devices to which Respondents object.[20]

[20] Indeed, Congress treated the mandate as a lesser-value goal by requiring even grandfathered plans to comply with some ACA requirements (such as the prohibition on lifetime limits and the extension of young adult coverage), but not with the mandate. See 42 U.S.C. § 18011 (requiring grandfathered plans to comply with 42 U.S.C. § 300gg-11, 300gg-12, and 300gg-14, but not 42 U.S.C. § 300gg-13).

Moreover, the IOM Report does not even discuss the necessity of *covering* specific contraceptive methods in employer-provided health plans.[21] HHS never asked the IOM to make recommendations about "coverage decisions," which the Report noted "often consider a host of other issues, such as * * * ethical, legal, and social issues; and availability of alternatives." IOM Report at 6-7; *id.* at 2 (HRSA charge). In fact, HHS ordered the IOM to *exclude* coverage-relevant considerations like "cost effectiveness." *Id.* at 3.

The government's generally-stated interest in gender equality fares no better. Putting to one side the oddity of a claim that mandating contraceptives for women but not men is strictly necessary to promote gender equality, this asserted interest remains hopelessly general. The government relies entirely on boilerplate assertions that "women have different health needs than men," and therefore face higher costs than men, which they "may not be able to afford." Pet.Br.49-51. These broad assertions would justify virtually any forced subsidization of health care costs for women, but they hardly suffice to demonstrate that forcing Respondents to provide four drugs and devices is strictly necessary to promote gender equality. The government has thus failed even to argue, much less demonstrate, that Respondents' practice of covering

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[21] The government also fails to articulate a public health justification for two of the products Respondents do not cover, Plan B and Ella. Instead, it merely asserts that "contraceptive methods are not interchangeable," and that certain IUDs are more effective than others—without any evidence that Respondents' inability to cover the four objectionable products actually creates a compelling public health problem in need of remedy. Pet.Br.48.

most contraceptives along with the vast majority of women's preventive care—while merely excluding the four items at issue here—triggers any gender equality interest at all, much less a compelling one.

The government's failures in this regard are fatal. Strict scrutiny requires real evidence of an "actual problem in need of solving." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (quotation omitted). But the government has offered *no* proof that Respondents' exclusion of these four contraceptives threatens public health or gender equality at all. See *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821 (2000) (noting that, "[w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is"). Because the government "bears the risk of uncertainty" under strict scrutiny, "ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2739. The government has not carried its heavy burden.[22]

This is not the first time the federal government has incorrectly relied on such overbroad interests. In *O Centro*, the government opposed a RFRA exemption for a group's religious use of a tea (*hoasca*) containing DMT, a Schedule I narcotic under the Controlled Substances Act ("CSA"). 546 U.S. at 425 (citing 21 U.S.C. § 812(c)). The government argued that the CSA's conclusion that Schedule I narcotics are unsafe and susceptible to abuse was a sufficiently compelling

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[22] To the extent the government argues that mandating coverage of these four items somehow *marginally* advances its public health interests, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

reason to deny individualized exemptions under the statute. *Id.* at 430. But this Court rejected that argument because RFRA requires this Court to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 430-31. Applying that "more focused" inquiry, this Court held that DMT's placement under Schedule I did not "relieve[ ] the Government of the obligation to shoulder its burden under RFRA." *Id.* at 430-32. First, there was no showing that Congress had "considered the harms posed by the particular use [of DMT] at issue [t]here—the circumscribed, sacramental use of *hoasca*." *Ibid.* Second, the Schedule I listing could not carry "determinative weight," because the CSA authorized individual exemptions from its requirements. *Id.* at 432-33. Third, Congress had already made such an exemption for Native Americans' religious use of peyote, also a Schedule I narcotic. *Id.* at 433-34.

Those same basic problems bedevil the government's reliance on broad interests in public health and gender equality. Even if the mandate promotes those interests, the salient question is whether the religious accommodations RFRA would otherwise compel fatally undermine those interests. In *O Centro*, a single exemption for another Schedule I substance was fatal to the government's effort to invoke the statute's broader goals. Here, the statute is silent on the need for mandatory contraception coverage, the regulations envision exemptions, and numerous exemptions have been granted. If it really were strictly necessary to both public health and

gender equality for all employers to pay for these four drugs and devices, it would be well-nigh inexplicable that the government allows so many employers to decline to provide this assertedly indispensable subsidy. "[A] law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (quotation omitted). As explained by the Tenth Circuit—and as confirmed by every court to address strict scrutiny—the mandate is subject to a wide variety of exceptions that undermine any claim that the government's interests are compelling. Simply stated, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a; Judicial Education Project *Amicus* Br.5 n.2 (collecting cases).

For example, many employers are not required to cover any contraceptives at all, including those offering "grandfathered" plans, 42 U.S.C. § 18011, and those with fewer than fifty employees (who are not required to offer health insurance to begin with), 26 U.S.C. § 4980H(c)(2)(A).[23] In addition, HHS has already granted religious exemptions for other entities (including corporations) pursuant to express regulatory authority to do precisely what it claims this Court cannot do: "establish exemptions * * * with

[23] The government insists that grandfathering is "transition[al]," Pet.Br.53, but, as the court of appeals pointed out, plans may remain grandfathered "indefinitely," Pet.App.13a. Grandfathered plans may add new beneficiaries, change insurance issuers, and enter into new insurance contracts. 45 C.F.R. § 147.140(a)(1)(i); (b). The co-pay limits for grandfathered plans are indexed to medical inflation. *Id.* § 147.140(g)(iv).

respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); 147.131(a).[24]

These numerous exceptions belie the government's claim that the mandate is strictly necessary to further compelling interests in public health, gender equality, or anything else. Government programs necessary to furthering compelling interests do not provide express and open-ended regulatory authority to grant exemptions. Nor do they typically provide "grandfather" clauses that permit the supposedly vital subsidy to be phased in over time (or never at all) to accommodate the administrative convenience of both regulators and regulated.

2. The mandate's numerous exemptions also fatally undermine the government's newly-identified interest in ensuring a "comprehensive insurance system." Pet.Br.38-46. The government did not invoke this compelling interest below and the argument is thus forfeited. But the reason the government did not invoke it below is that the asserted interest is a complete misfit. The mandate, honeycombed with religious and secular exemptions,

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[24] The government warns that, if the Court finds these exemptions undermine its compelling interests, this "would *discourage* the government from accommodating religion." Pet.Br.52. But "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436. RFRA requires "case-by-case consideration of religious exemptions to generally applicable rules." *Ibid.* Here, the numerous exemptions already given show the government lacks a compelling interest in denying a religious exemption to Respondents.

is the antithesis of the kind of government program whose demands for true comprehensiveness and uniformity can admit no exceptions. Given the mandate's myriad exemptions, invoking a compelling interest in a "comprehensive insurance system," Pet.Br.38, 46, is like invoking a compelling interest in maintaining an impenetrable barrier to justify a sieve.

The exceptions for the religious exercise of other groups and for grandfathered plans are devastating to the government not just because they undermine the strength of its late-breaking interest. They are devastating because RFRA itself demands that the government consider the feasibility of making exceptions to otherwise general rules in order to accommodate religious exercise. Thus, as this Court emphasized in *O Centro*, RFRA utterly rejects "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. at 436. To the contrary, "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability.'" *Ibid.* (quoting 42 U.S.C. § 2000bb-1(a)). Under that demanding test, the government's ability to grant one exception—there, for peyote—without fatally undermining the statutory goals doomed the government's ability to refuse another exception when doing so would remove a substantial burden on religious exercise. Here, not only has the government already granted myriad exemptions covering millions, but its justification for many of those is mere administrative convenience, which is all that supports the grandfather clause. In light of that, the

government's authority to decline to alleviate the substantial burden on Respondents is nil.

The mandate's numerous exceptions make the government's reliance on *Lee* profoundly puzzling. *Lee* involved an Amish employer who objected to paying social security taxes for his Amish employees. While this Court found a substantial burden and was unfazed by the commercial context, it nonetheless held that "[t]he design of the [social security] system requires support by mandatory contributions from covered employers *and* employees," and that "mandatory participation is indispensable" to the system's "fiscal vitality." *Lee*, 455 U.S. at 258 (emphasis added). As the government explained to this Court in *Lee*, the "social security system was established when private systems of voluntary support collapsed under the burden of all those who had no other means of survival," and the system "could not exist" with broad exemptions. Gov't Br.*27-28, *United States* v. *Lee*, No. 80-767, 1981 WL 389829 (U.S. June 5, 1981). "Widespread individual voluntary coverage" would be "difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258.

Lee simply recognizes what is implicit in RFRA. Some laws demand virtually uniform and universal participation. In those rare cases, the government might be able to show that opt outs—even for the best of reasons—are incompatible with its objectives. See generally *O Centro*, 546 U.S. at 435 (explaining government can demonstrate compelling interest in uniform application only "by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer

the program") (discussing *Lee* and *Braunfeld*). But the mandate is nothing like social security. The exceptions the government itself has allowed, for religious and non-religious reasons alike, conclusively demonstrate that the mandate is perfectly compatible with the religious exemptions required by RFRA.

The government's related newfound argument that it has created private enforcement rights for third parties under ERISA is likewise both forfeited and deeply flawed. The government claims that granting Respondents a RFRA exemption would "disrupt" its preferred allotment of rights, and would "deprive participants and beneficiaries of statutorily-guaranteed benefits." Pet.Br.43. But this argument does little more than describe why the program substantially burdens Respondents' religious exercise. The fact that the government requires a qualifying health plan to provide these objectionable products and allows employees to use ERISA to enforce the requirement hardly strengthens the government's case. If anything, subjecting Respondents to private enforcement actions on top of government penalties only underscores the substantiality of the burden.

The government's reliance on ERISA fails for two other reasons. First, an exemption for Respondents would not stop the government from using any of the myriad available alternatives to provide access to the products at issue. Second, not receiving coerced coverage from Respondents cannot be a cognizable harm, because nobody is lawfully entitled to a "benefit" from a regulatory scheme that violates RFRA. Religious exemptions to laws forcing nurses to assist with abortions, bookstores to sell Bibles, or

convenience stores to sell liquor would all just as surely "deprive" someone of a "statutorily-guaranteed benefit." But that kind of impact on third parties should be irrelevant to the RFRA analysis. Any time a statute takes the form of a mandate that party A must do something for party B, granting a RFRA exemption to party A will make party B worse off. But there is no reason whatsoever to treat exemptions from such Peter-to-Paul mandates as uniquely disfavored under RFRA.[25]

Finally, the government's interest in "ERISA rights" suffers the same fundamental problem as its other failed interests—namely the mandate's exemptions for religious and non-religious employers. Exempted employers may exclude the four items at issue here without fatally undermining ERISA or any other compelling interest. Of course, those plans do not violate ERISA by not offering the mandated

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[25] Contrary to the government's suggestion, Pet.Br.40-41, *Sherbert* and *Yoder* both rejected the argument that a religious exemption was unavailable because it would burden third parties. In *Sherbert*, the state claimed that an exemption from the unemployment system would lead to "spurious claims" that could "dilute the unemployment compensation fund" and burden employer scheduling. 374 U.S. at 407. In *Yoder*, the state claimed an exemption from the compulsory attendance law would burden "the substantive right of the Amish child to a secondary education." 406 U.S. at 229-31. Applying strict scrutiny in both cases, the Court found the state failed to prove those burdens would actually flow from the exemptions and also that the state could not alleviate them through less restrictive means. See, *e.g.*, *Sherbert*, 374 U.S. at 408 (it would "plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights").

coverage, but that is the whole point. The government's ERISA-based argument is nothing more than a description of its own mandate system, which can and does make exceptions for religious and non-religious employers.[26] RFRA simply mandates a further exception for Respondents when, as here, it is necessary to eliminate a substantial burden on sincerely held religious beliefs.[27]

2. The mandate is not the least restrictive means of achieving the government's asserted interests.

Even if it could offer actual evidence that Respondents' religious exercise threatened a

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[26] This uniformity argument is further undermined by the fact that Congress chose not to make ERISA applicable to all plans. For example, as the government explained in *Little Sisters of the Poor et al.* v. *Sebelius*, Congress provided that "'church plan[s]' * * * are exempt entirely from regulation under ERISA," unless they elect otherwise. Gov't Br.15, *Little Sisters*, No. 13A691 (U.S. Jan. 3, 2014); see also Letter from the Church Alliance to HHS 2 (Apr. 8, 2013), http://church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf (church plans cover "approximately one million participants" from more than 155,000 churches, synagogues, and affiliated organizations).

[27] Nor is RFRA protection "incompatib[le]" with ERISA. Pet.Br.43. Indeed, in another mandate case, the government conceded that, in third-party lawsuits under ERISA, religious employers "would be free to raise their religious objections as defenses in that litigation, see, *e.g.*, 42 U.S.C. § 2000bb-1(c), and the plan participant would be free to contest those defenses." Gov't Br., *Wheaton Coll.* v. *Sebelius*, No. 12-5273, 2012 WL 5398977, at *16 (D.C. Cir. Nov. 5, 2012). The government also mischaracterizes lower court authority about whether RFRA applies in private lawsuits (Pet.Br.43-44), which in reality strongly supports what it told the D.C. Circuit in *Wheaton*. Judicial Education Project *Amicus* Br.24-25.

compelling government interest, the government has not proven that its refusal to exempt Respondents is the least restrictive means of achieving that interest. Under strict scrutiny, the government must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407. If a less restrictive alternative would serve its purpose, the government "must use that alternative." *Playboy Entm't Group*, 529 U.S. at 813.

The government ignores these familiar standards. The only asserted interests the government has preserved are pitched at such a high level of generality that they defy the least restrictive means analysis. There are literally thousands of ways for the government to advance general interests in promoting public health and gender equality without implicating Respondents' religious exercise. The conflict here arises only because the government has chosen the hardly obvious path of forcing Respondents to pay for religiously-objectionable drugs and devices.

The government's only response is to dilute the least restrictive alternative test with the bald assertion that it "does not require Congress to create or expand federal programs." Pet.Br.57. But the government cites no authority for this statement, which contradicts RFRA's command that *the government* (which surely includes Congress) has the burden of demonstrating that no less restrictive means could achieve its allegedly compelling interest.[28] If Congress had wanted to accommodate

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[28] *Cf. Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (identifying the following less restrictive alternatives

religious exercise only where there was no budget-neutral least restrictive alternative or no least restrictive alternative available within the existing corpus of federal programs, presumably it would have said so.

The most obvious less-restrictive alternative is for the government to pay for its favored contraceptive methods itself. See, *e.g.*, 42 C.F.R. § 59.5(a)(1)) (authorizing grants to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services" through Title X of the Public Health Service Act). And indeed the government has attempted something like that with respect to certain objecting employers. See 78 Fed. Reg. at 39879-80 (outlining accommodation for self-insured religious non-profits). But when the government is disinclined to pay for some favored subsidy and decides to make someone else pay for it—especially when the subsidy touches subjects as religiously sensitive as abortion and contraception—the government cannot be surprised if RFRA poses an obstacle.[29]

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to state's overbroad fundraising disclosure law: (1) creating a new publication program, and (2) expanding the enforcement of existing antifraud laws).

[29] Indeed, employees who want health coverage for the four products at issue here could simply purchase their own policy on the exchanges. See *What if I Have Job-Based Insurance?*, HealthCare.gov, https://www.healthcare.gov/what-if-i-have-job-based-health-insurance/. Employees who decline employer-based insurance are generally not eligible for subsidized premiums, but the government could change that with the stroke of a pen, if it believes its stated interests are compelling enough to do so.

And that is why in the final analysis this is such a straight-forward case under RFRA. The government concedes both that Respondents' beliefs are sincere and that the mandate burdens them. The government's effort to dismiss that burden as insubstantial is belied by the draconian fines for non-compliance and its willingness to accommodate others with the exact same beliefs. That means strict scrutiny applies and under that demanding standard the case is not close. The hard cases under strict scrutiny are those like *Lee* where the mandate at issue is virtually uniform and universal—not a case like this one where the mandate is riddled with exceptions. Indeed, the ultimate question here is not whether there will be an exception to an otherwise uniform mandate, but who will pay for a third-party's religiously-sensitive abortifacients. The government already exempts many employers. And when the government's objectives are perfectly compatible with granting exceptions for reasons both religious and secular, RFRA leaves no room to decline exceptions for others whose sincerely-held religious beliefs are substantially burdened.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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