Nos. 13-354, 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF *AMICI CURIAE* THE CENTER FOR INQUIRY, AMERICAN HUMANIST ASSOCIATION, AMERICAN ATHEISTS, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, AND THE INSTITUTE FOR SCIENCE AND HUMAN VALUES, IN SUPPORT OF THE GOVERNMENT

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STATEMENT OF INTEREST [1]

This *amici curiae* brief in support of the Government is being filed on behalf of the Center for Inquiry ("CFI"), the American Humanist Association, American Atheists, the Military Association of Atheists and Freethinkers, and the Institute for Science and Human Values.

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association ("AHA") is a national nonprofit organization that advocates for the rights and viewpoints of humanists. Founded in 1941, its work is extended through more than 175 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal

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[1] The Government and Conestoga Wood Specialties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. Counsel of Record for Hobby Lobby has granted written consent for this brief to be filed; this consent is also on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

fulfillment that aspire to the greater good of humanity. The mission of AHA's legal center is to defend the constitutional mandate of separation of church and state.

American Atheists, Inc. ("American Atheists") is a New Jersey educational, non-political, nonprofit corporation with members, offices, and/or meeting locations nationwide and in various municipalities. American Atheists is a membership organization dedicated to advancing and promoting, in all lawful ways, the complete and absolute separation of church and state and to preserving equal coverage for atheists under the protections found in the Bill of Rights, and, in particular, the First Amendment to the United States Constitution. American Atheists promotes the stimulation and freedom of thought and inquiry regarding religious belief, creeds, dogmas, tenets, rituals and practices. It seeks to collect and disseminate information and literature on all religions in order to promote a thorough understanding of them. It encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding and interdependence of all people and the corresponding responsibility of each individual in relation to society.

The Military Association of Atheists and Freethinkers represents active duty and former military personnel in all branches of service who protect a nation that does not discriminate on the basis of belief and does not promote one type of belief to the exclusion of others.

The Institute for Science and Human Values is committed to protecting and advancing women's full equality and health, with a particular interest in ensuring that women receive all the benefits of access

to paid contraceptive coverage, as provided in the Affordable Care Act, without regard to the religious views of their employer.

Amici thereby comprise a diverse array of secular and humanist organizations that advocate on behalf of the separation of church and state and offer a unique viewpoint concerning the importance of religious freedom in the United States. The granting of exemptions to religious groups from laws of general applicability at issue in this case jeopardizes amici's core humanist and secular interests in the separation of church and state. Amici are accordingly deeply invested in preserving appropriately stringent judicial scrutiny of exemptions from such generally applicable laws.

SUMMARY OF ARGUMENT

Both the government and the corporations seeking exemption focus their arguments on the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb-1. The government correctly maintains that there is no substantial burden on the free exercise of religion of the owners of the corporations, or indeed on the rights of the corporations themselves, if this Court were to find that such rights exist. It is the position of *Amici* herein that the granting of the requested exemption is not only not required under RFRA, but is also unconstitutional, because it would violate the Establishment Clause.

First, there exists no First Amendment, Free Exercise Clause based right to an exemption from the Contraceptive Mandate ("Mandate"), 77 Fed. Reg. 8724, 8725 (Feb. 15 2012) of the Patient Protection and Affordable Care Act ("ACA"). Pub. L. No. 111-148, 124 Stat. 119 (2010). Under controlling Supreme Court

precedent, Congress does not impinge on the right to free exercise of religion when it enacts a law of general applicability, even if that law impacts an individual's ability to practice her religion. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990). The only exception to this rule is where a law targets the practice of a religious group for discriminatory treatment, and so is not truly one of general applicability. *Church of Lukumi Balalu Aye v. City of Hialeah*, 508 U.S. 520, 536-37 (1993). As the Mandate is generally applicable, and does not target religion in general or any specific religion, any burden it creates on religious practice is not a violation of the Free Exercise Clause.

Congress responded to *Smith* by passing RFRA, imposing a compelling government interest standard for substantial infringements of free exercise. However, any exemptions granted under RFRA are legislative, not constitutional protections, so RFRA must withstand constitutional scrutiny, both facially and as applied. In particular, any protections given over and above *Smith* to religious exercise must not violate the Establishment Clause.

Second, this Court has held repeatedly that a permissive exception to a generally applicable law, such as that granted under RFRA, violates the Establishment Clause when a government created burden is shifted from the complaining individual to a third party. Such a burden shifting would occur, here, because in order to satisfy the religious concerns of business owners, individual employees would have their ability to obtain preventive health services, in the form of legally approved contraception, adversely affected.

Third, the burden on religious practice claimed by these employers is a minimal one, if it exists at all. Despite the ruling of the Tenth Circuit, courts may not simply take plaintiffs' allegations of a burden at face value. Any burden that exists here is a purely self-imposed one, created by the employer's decisions made for purely business reasons which are unprotected by any constitutional right. Moreover, the alleged burden in this case is contingent on the independent decisions of nongovernmental third parties, that is, the decisions of employees who may or may not decide to use the forms of contraception to which the employers object. As this Court has repeatedly found in Establishment Clause cases, actions of third parties cannot be attributed to the government. *E.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 650-51 (2002).

Fourth, any such exemption granted here could not be controlled without violating the First Amendment by preferring one religion over another, or religious belief, generally, over nonbelief. Any exemption would be followed by a series of further exemptions, as almost any medical procedure could be seen as violating the religious beliefs of one or more religious groups or sects.

The exemption sought here by Hobby Lobby, Conestoga Wood, and their respective owners is therefore not required by the Free Exercise Clause, and, in fact, would violate the Establishment Clause. As such, it must be rejected by this Court.

ARGUMENT

I. THERE IS NO FREE EXERCISE CLAUSE RIGHT TO AN EXEMPTION FROM THE MANDATE

A. Generally applicable laws which indirectly affect religious practices do not violate the First Amendment

The various Circuits that have considered the Mandate have spent little to no time on the merits of the claims asserted under the First Amendment except to opine on whether the Free Exercise Clause even protects for-profit corporations as opposed to individuals and nonprofit religious corporations. The reason for this is clear. This Court has ruled that there is no violation of the Free Exercise Clause's protections when Congress enacts "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a plaintiff's] religion prescribes (or proscribes)." *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 409 (E.D. Pa. 2013) (*citing Smith*, 494 U.S. at 879).

That laws applying to all will affect an individual's religious beliefs is an unavoidable part of living in a modern, diverse society with a functioning government. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires.") The rule as set out in *Smith* prevents such incidental burdens on religion, that may come with broad reaching legislation, from rising to the level of a constitutional violation. Where such a burden occurs, "it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their

religious beliefs." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

The Free Exercise Clause is implicated only when the *objective* of a law is to single out and impose a burden on a particular religion's practices. Legislation that specifically targets a religious practice, unless meeting the compelling interest test, would violate the First Amendment. *Smith*, 494 U.S. at 878. ("It would doubtless be unconstitutional . . . to prohibit bowing down before a golden calf.") Such a law targeted at a religious practice was struck down by this Court in *City of Hialeah*, 508 U.S., at 540-41, where a local ordinance was held to be written in a fashion such as to prohibit the killing of animals only by practitioners of Santeria. Significantly, even if the objective of a law is to burden a particular religious practice, it may still be upheld if it satisfies the compelling interest test. The ordinance in *City of Hialeah* was unconstitutional because the true purpose of the legislation, as evidenced by the ordinance's legislative history, was to push Santerians out of the city. 508 U.S. at 540-41.

There is no credible argument that such targeting of religion is occurring here with the Mandate. The Mandate applies to all employers covered by the Affordable Care Act, with the exception of a broad range of religious nonprofit corporations fully exempted or granted accommodations by executive action. Not only is the Affordable Care Act one of general applicability, it is a validly enacted law, as determined by this Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2608 (2012).

B. Permissive religious exemptions to laws of general applicability are subject to Establishment Clause review

In his majority opinion in *Smith*, Justice Scalia noted that while the First Amendment did not *require* religious exemptions from laws of general applicability, they were *permissible*. 494 U.S. at 890. In response to that decision, Congress enacted RFRA, with the express purpose of making the compelling interest test the standard of review for government-imposed burdens on religion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1133 (10th Cir. 2013).

This Court, in *Smith*, determined the extent to which the Free Exercise Clause protected individuals from burdens on their religious practice. RFRA, as a legislative enactment, granted protections *beyond* those constitutional rights. Such permissive rights granted by act of Congress are subject to constitutional scrutiny by this Court. When an exemption sought under RFRA violates the Establishment Clause, it is not permitted. Congress does not have the authority to violate the Constitution, nor can Congress overrule a Supreme Court determination of the extent of constitutional protections, short of the passage of an actual constitutional amendment. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the Constitution is "superior, paramount law, unchangeable by ordinary means . . . [It is not] alterable when the legislature shall please to alter it.")

Any exemption claimed under RFRA, such as that sought by Hobby Lobby and Conestoga Wood Specialties here, must, therefore, pass constitutional review under the Establishment Clause. RFRA was ruled unconstitutional as applied to the states by this Court in *City of Boerne*, 521 U.S. at 536. However, it has

been treated as facially constitutional regarding the federal government.[2] Facial constitutionality does not end the scrutiny, as laws may still be applied in ways which violate the constitution.

The Establishment Clause "mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The granting of an injunction to Hobby Lobby and Conestoga Wood Specialties, exempting those profit-making corporations from obeying a generally applicable law on religious grounds, would be a breach of such neutrality, burdening the employees of those corporations in order to further the religious interests of the corporate entities and their owners.

II. GRANTING A RELIGIOUS EXEMPTION HERE VIOLATES THE ESTABLISHMENT CLAUSE BY IMPOSING A BURDEN ON THIRD PARTIES

A. An exemption would shift a burden to the employees of Hobby Lobby and Conestoga Wood Specialties

The express purpose of RFRA is to defend the freedom to practice religion against restrictions imposed

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[2] *Amici* do not concede the constitutional validity of RFRA, as it grants privileges to religion which violate the Establishment Clause. *See The Religious Freedom Restoration Act is Unconstitutional, Period*, Marci A. Hamilton, 1 U. Pa. J. Const. L. 1, 19 (1998-99). As Justice Stevens noted in his concurrence in *City of Boerne*, "Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." 521 U.S. at 537 (Stevens, J., concurring). However, for purposes of this brief, *amici* assume the facial constitutionality of RFRA.

by the government. Where RFRA has traditionally been applied, the government can remove the burden on religious practice through the creation of an exemption that affects only the complaining party. For example, in *Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 423 (2006), members of a Brazilian church located in New Mexico were denied permission to use a tea brewed from plants unique to the Amazon Rainforest, because the tea contained a hallucinogen controlled under federal law. Noting the government already provided exemptions to such drug laws for sacramental purposes, 546 U.S. at 436-37, a unanimous court ruled in favor of the church. No burden was placed on third parties through the grant of an exemption to the church.

The case presented here is wholly different. Unlike the members of the Brazilian church, Hobby Lobby and Conestoga Wood Specialties seek an exemption that will have a direct adverse impact on third parties, namely the employees of those companies. The rights and interests of these employees must also be considered in ruling on the companies' RFRA claims. Under the ACA, these employees are legally entitled to health insurance through their employers that covers a range of "preventive healthcare services" without copay or extra cost. 42 U.S.C. § 300gg-13(a). These services have been defined by executive agencies to include contraception. 45 CFR § 147.130(a)(1)(iv)(A). The ACA has been passed by Congress, signed by the president and ruled constitutional by this Court. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608. It is now in effect. The employees of these companies, like employees of all other covered companies, are therefore legally entitled to this coverage and any

exemption would negatively affect them by removing that entitlement.[3]

B. This Court has found permissive religious exemptions that burden third parties to be unconstitutional

As explained, *supra*, Hobby Lobby and Conestoga Wood Specialties are seeking a permissive accommodation. As found in *Smith*, Congress has the power to grant such an accommodation, but only when it is consistent with other constitutional requirements. 494 U.S. at 890. This Court has held that when granting such a religious accommodation imposes burdens on third parties, it violates the Establishment Clause and is, therefore, unconstitutional.

This can be seen most clearly in cases dealing with Sabbath observance. When presented with a Connecticut law requiring businesses to honor requests from their employees not to work on their Sabbath day, this Court held that the law violated the Establishment Clause. *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703 (1985).[4] This Court noted that it was the absolute nature of the requirement that made it unconstitutional, as it took "no account of the convenience or interests of the employer *or those of other employees who do not observe a Sabbath*." 472 U.S. at

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[3] As courts have stressed, such a removal would be tantamount to a reduction in wages. "But consider that health insurance is an element of employee compensation." *Grote v. Sebelius*, 708 F. 3d 850, 861 (7th Cir. 2013). An exemption for the company can therefore truly be characterized as a reduction in compensation for the affected employees.

[4] While *Thornton* predates the enactment of RFRA, this Court has repeatedly noted that RFRA seeks to return jurisprudence to the pre-*Smith* standard, and prior precedent is therefore applicable. *E.g. Gonzales*, 546 U.S. at 424, 431.

709 (emphasis added). Accommodating the religious interests of those who sought to take their Sabbath off would create a burden on those who did not share those religious beliefs. Such a rule could not stand, as it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id*. at 709-10.

This Court has reached the same conclusion in Title VII employment discrimination cases. 42 U.S.C. § 2000e *et seq*. When a Sabbatarian airline employee claimed the right to an accommodation of his religious requirement for Saturdays off work, this Court rejected his claim. *T.W.A. v. Hardison*, 432 U.S. 63, 85 (1977). While this Court did not dispute the sincerity of the employee's religious convictions, it noted that there was no requirement to provide such an accommodation, as the effect would have been "to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Id*. at 81.

An identical standard to that in RFRA is applied to alleged burdens on the religious exercise of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[5] 42 U.S.C. § 2000cc. In applying that standard, this Court has confirmed that permissive accommodations will be held to be unconstitutional if they create burdens on third parties. When incarcerated members of minority religions sued the Ohio Department of Corrections claiming a right to accommodations under RLUIPA, this Court upheld their claims, but noted that "[p]roperly applying RLUIPA, courts must take adequate notice of the burdens a requested accommodation may impose on

[5] *See Hobby Lobby Stores, Inc.*, 723 F. 3d at 1138 n.13.

non-beneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Where such requests for accommodation would "impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution," *id*. at 726, they are not only not required under RLUIPA, they could violate the Establishment Clause. "In that event, adjudication in as applied challenges would be in order." *Id*.

In the case with claims most analogous to those presented by Hobby Lobby and Conestoga Wood Specialties, *United States v. Lee*, 455 U.S. 252 (1982), this Court unqualifiedly enforced the rule that religious accommodations which impose burdens on third parties would not be permitted. In *Lee*, an Amish employer sought an exemption permitting him to avoid paying required social security contributions for his employees. This Court refused, noting that granting such an exemption "operates to impose the employer's religious faith on the employees." 455 U.S. at 261. This Court acknowledged that Congress had exempted self-employed Amish from paying social security contributions for themselves, but refused to extend the exemption to contributions for employees, who might not share the same religious convictions. *Id*. Importantly, this Court stressed that if religious individuals enter the world of business, they voluntarily accept that some regulations may conflict with their religion. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id*.

Similarly, this Court has denied exemptions to religious organizations from minimum wage laws,

stating that their religious character does not justify depriving employees of minimum wage protection. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 306 (1985). This Court also found that exempting religious materials from sales tax, thereby increasing the tax burden on secular materials, violated the Establishment Clause. *Texas Monthly v. Bullock*, 489 U.S. 1, 14 (1989).[6]

This Court's decision in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), is not inconsistent with this analysis. In *Amos*, this Court upheld Section 702 of Title VII, 42 U.S.C. § 2000e *et seq*., which exempts religious organizations from that statute's ban on employment discrimination based on religion. In upholding this exemption, this Court made clear that religion was not a constitutional *carte blanche* for demanding exemptions. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'" 438 U.S. at 334-35 *citing Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 145 (1987). Moreover, the concurrences by Justices Brennan and O'Connor stress the importance of permitting the church leeway in determining how it fulfills its nonprofit community service role. *Amos*, 483 U.S. at 344 (Brennan, J., *concurring*) ("The risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities.") (emphasis in

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[6] For a more complete analysis of these cases, *see* Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. ___ (2014), at 19-20, 27-28 available online at http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2328516 or http://dx.doi.org/10.2139/ssrn.2328516 (last visited Jan. 21, 2014).

original); *Univ. of Great Falls v. NLRB*, 278 F. 3d 1335, 1344 (D.C. Cir. 2002) (stressing the importance of nonprofit status for the holding in *Amos*). The instant case, involving for-profit corporations, does not raise the same concerns.

C. The burden shifted to third parties here is substantial

The baseline from which we must consider whether a burden has been imposed on a third party is the situation that would exist absent the exemption. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) ("When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured.").[7] For instance, in *Thornton*, 472 U.S. at 709-10, the baseline was a situation prior to the Sabbath leave law, where nonreligious employees were not required to bear the burden of covering for their coworkers' religiously motivated days off. In the instant case, the baseline would be that the employees of Hobby Lobby and Conestoga Wood Specialties are covered under the Mandate, and are able to obtain these prescription contraceptive services without copayment. The burden can therefore be seen as the harm done to employees of these corporations in not receiving the full benefits granted to them under the ACA, a burden created as a direct result of the religious exemption sought by their employer.

It may be difficult to quantify such a burden precisely, but there can be no doubt that the burden is substantial. Studies by Planned Parenthood have shown that the cost of an intrauterine device (IUD),

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[7] *See also* Gedicks & Van Tassell, *supra* note 6, at 34-35.

including the fees for the required medical examination, insertion, and ongoing follow up visits, ranges from $500 to $1,000.[8] While Hobby Lobby and Conestoga Wood Specialties claim no religious objection to covering oral contraceptives, the most commonly used drug covered under the Mandate, the Tenth Circuit in *Newland v. Sebelius*, 2013 U.S. App. LEXIS 20223, at *7 (10th Cir. Oct. 3, 2013), affirmed a district court injunction allowing a for-profit corporation to exclude all forms of contraception from its health plan.[9] For these forms of contraception, the annualized cost is between $180 and $960, with the cheaper, generic contraceptives often being reported as causing unpleasant side effects. *See* Gedicks and Van Tassell, *supra* note 6, at 38-43.

The direct costs of purchasing contraception which the Mandate provides as free would therefore place a significant burden on many employees. A religiously based exemption for employers could realistically cost female employees, who do not share their employers' religious convictions, around $1,000 a year. But this monetary amount, while significant, underestimates the true burden of such exemptions. The determination not to cover emergency contraception may place women in a situation where they cannot afford the out-of-pocket payment for necessary drugs, leading either

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[8] *See* Planned Parenthood, *IUD: Where can I Get an IUD? How much does an IUD Cost?*, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited Jan. 21, 2014).

[9] Attempts by for-profit corporations to be completely exempt from coverage of all forms of contraception can also be seen in cases before other Circuits. *E.g. Korte v. Sebelius*, 735 F. 3d 654, 662-63 (7th Cir. 2013); *Gilardi v. United States Dep't of Health & Human Servs.*, 733 F. 3d 1208, 1210 (D.C. Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F. 3d 618, 621 (6th Cir. 2013).

to unwanted pregnancy or a more expensive later abortion. Employees who desire such coverage would be presented with the dilemma of leaving their jobs and seeking employment elsewhere or paying for the religious predilections of their employer. When Hobby Lobby and Conestoga Wood Specialties present this case as a matter of the alleged rights of the for-profit corporation to be free from government interference in religion, they are presenting a distorted view of the dispute. What is truly at stake is the right of individual workers not to have their health care benefits determined by the religious beliefs of their employer.

As controlling precedent of this Court shows, where such a substantial burden will be imposed on a third party, granting an exemption violates the Establishment Clause. *Thornton*, 472 U.S. at 709-10; *T.W.A.*, 432 U.S. at 81. While the individual owners of Hobby Lobby and Conestoga Woods Specialties undoubtedly have deeply felt and sincere religious beliefs,[10] these beliefs do not grant them the right to shift the burden of a law of general applicability onto their workforce, who do not share the same convictions. To do so would be to privilege religion, and the religion of the particular owners, over the rights of those who do not share those beliefs. Such discrimination has no place in the United States.

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[10] *Amici* note, however, that the idea of a for-profit corporation being held to possess such beliefs, and thereby having Free Exercise Clause rights, is one which has no support in case law. But this issue is adequately addressed in other briefs before this Court and will not be discussed further here.

III. THE MANDATE IMPOSES NO SUBSTANTIAL BURDEN ON THE RELIGIOUS FREEDOM OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES

As shown, *supra*, this Court has never allowed religious exemptions from laws of general applicability where such accommodation would create a burden on a third party. However neither Hobby Lobby and Conestoga Wood Specialties, nor their respective owners, the Greens and the Hahns, will suffer any legally significant injury if the injunction sought here is denied. This is true even if the for-profit corporations concerned are required to fulfill the requirements of the ACA and provide insurance coverage to their employees for a full range of preventive medical care.

A. The finding of a burden by lower courts is based on flawed reasoning

The Tenth Circuit, in *Hobby Lobby*, renounced any role for the court system in determining whether a burden is a real or an imagined one. In summarily dismissing the government's claim that no burden existed because the employee's independent decision in conjunction with a doctor's prescription triggered the offending act – the payment for and use of certain types of contraceptive – that court held that its "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." 723 F. 3d at 1137. Such a definition of substantial burden essentially removes *any* limit on claims of religious based exemptions to laws of general applicability. However attenuated or counterfactual the burden alleged may be, the Tenth Circuit found that, provided a belief in its effects was genuine, then,

under RFRA, the government would be required to show that it acted in the furtherance of a compelling governmental interest, and, moreover, used the least restrictive means possible to further that interest.

When the decisions of this Court are examined, however, it becomes clear that the Tenth Circuit erred in using such a broad definition of religious harm to dismiss the government's defense of the Mandate. It is not permissible for an individual, let alone a for-profit corporation, to define its own reality. If evidence, as here, demonstrates that a law of general applicability does not in any way directly involve a person in the action which they believe, however sincerely, is religiously forbidden, then it cannot create the kind of burden required for a RFRA case to succeed. A belief, however sincere, that the government is requiring one to consume pork does not create a burden on one's religious practices of eschewing pork if the government can demonstrate that it does not, in fact, force one to consume pork. In *Hobby Lobby*, the Tenth Circuit erred by refusing to consider the government's argument that no burden existed on the corporation (that it was not, in essence, required to eat pork), and by instead taking the word of the allegedly injured party that such an injury had occurred. 723 F. 3d at 1138-40.[11]

As the government noted in *Hobby Lobby, id*., the Mandate does not require owners or corporations to use contraceptives, nor does it require them to purchase contraceptives for their employees. Instead, the Mandate requires that the health insurance plan

[11] The spread of such a standard would lead to an uncontrollable expansion of claims for religious exemptions under RFRA. *See, infra* IV A-B.

offered by the corporation covers a range of preventive health services, including FDA approved contraceptives, without copayment, which contraceptives may or may not be utilized by employees. The conceptual distance over which any burden has to travel is, therefore, vast. For instance, the first step is for the individual Christian employers to inform their for-profit corporation that it must provide a health care plan that conforms with the law of the land. This corporate entity, established to earn profits, and which acts as a shield against liability for the individual owners, then chooses whether to offer a third party provided health plan, such as from Blue Cross or Blue Shield, or to self-insure, providing health coverage through the corporation, with the plan administered by a third party administrative service. It is that third party, either administrator or insurance company, that informs the employee of their coverage. The employee, then, acting independently, chooses whether to visit a doctor, whether to request and receive a prescription for a particular type of contraceptive method, whether to fill that prescription at a pharmacy, and whether to use the prescribed contraceptive.

It strains credibility that this possible independent action by an employee can be considered an infringement on the religious free exercise rights of the individual owners, let alone any as-yet-to-be-discovered free exercise rights of the corporation. A burden under RFRA cannot be created by the fear that some third party may act in a way that the objecting party would not itself act.

Indeed, this Court has repeatedly decided cases where it has observed that the greater the conceptual distance, and greater the number of independent

decisions that occur in a chain of causation, the less plausible is the claim of causation, especially in matters of religious entanglement.[12] For example, in *Mitchell v. Helms*, 530 U.S. 793 (2000), this Court found constitutional a program permitting government aid to private schools that aided both secular and parochial education. Holding that such a program did not constitute an unconstitutional endorsement of religion, Justice Thomas' majority opinion noted that as the aid was "neutrally available, and, before reaching or benefiting any religious school, first pass[ed] through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion." 530 U.S. at 816 (internal citations omitted). If a single private decision by a single family is sufficient to prevent taxpayers' money from being characterized as government support for a religious school, then surely the attenuated path of decision-making involved in the process at issue here must remove any connection between the individual employer, or profit-making corporate entity, and the final decision of an employee to use contraception.

Two years later this Court again held that intervening independent decisions as to where money was spent removed any suggestion that the initial source of funding, the government, was responsible for its final use, which was providing support for parochial schools. *Zelman*, 536 U.S. at 654-55 ("[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a

[12] This principle is a basic cornerstone of tort law in the United States – liability attaches only when proximate cause can be demonstrated.

result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.")

B. Any burden that exists for the employer is voluntarily undertaken

Despite claims by Hobby Lobby and Conestoga Wood Specialties to the contrary, the fact that those corporations choose to self-insure, rather than provide their employees with the option of purchasing an insurance policy through a third party, to remove any possible link between the owners and the contraception decision, is of no significance in determining whether an actionable burden on religious expression exists. Such a decision is one wholly within the universe of choices of the corporation. It "is a decision made by the employer, likely in part or in whole for economic reasons." *Grote*, 708 F. 3d at 863. As noted by the Third Circuit, "the purpose – and only purpose – of the plaintiff Conestoga [and Hobby Lobby] is to make money!" *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 2013 U.S. App. LEXIS 2706, at *15 (3d Cir. Feb. 7, 2013) (Garth, concurring).

Such a voluntary, economic based decision cannot be the basis of a violation of free exercise rights. *E.g. Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (denial of deduction for monies paid for auditing by a Scientologist was not a free exercise violation as "[a]ny burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions."); *see also* Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 Wm. & Mary Bill of Rights J. 103, 112 (2008) (*discussing Prince v. Mass.*, 321 U.S. 158 (1944). "In essence, the threshold test requires that when such a

path is open [complying with both religious convictions and child labor laws without significant inconvenience], the believer must take [that path].")

If the choice of self-insurance or third party insurance does not impact whether a burden exists, where then is its source? This burden also cannot be found in any subsidy given to employees to purchase insurance, whereby corporate money, through private decision making, would end up paying for such coverage. Once again, there is no requirement in either the Constitution or the ACA for an employer to subsidize an employee's health care benefits. Any choice to do so is an economic one, made by a profit-making entity on business grounds. Hobby Lobby and Conestoga Wood Specialties could simply remove any subsidy, and replace it with a pay increase to permit the employees to purchase their own insurance at the same cost. Once the money leaves the coffers of the corporation, there can be no plausible claim that the corporation is responsible in any cognizable sense for how it is spent – to find otherwise would suggest that a corporation could prevent its employees from spending their salaries on items which the owners felt were religiously objectionable. An Islamic owner of a corporation cannot claim that a religious burden was imposed by the government if, for example, his employees choose to purchase pork and alcohol with their salaries, when the government allows such products to be legally sold.[13]

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[13] As the Seventh Circuit noted in *Grote*, health insurance is very much a part of an American employee's package of compensation, and "how an employee independently chooses to use that insurance arguably may be no different in kind from the ways in which she decides to spend her take-home pay." 708 F. 3d at 861.

C. This case does not involve a burden on religious liberty, but rather a complaint about government policy

The source of the religious burden allegedly imposed by the Mandate can then neither be the voluntary decision to self-insure, nor the voluntary decision to contribute financially to the purchase of insurance. This case does not involve any real burden on religious beliefs at all. Rather, this case is no more than a complaint about government policy. Simply put, Hobby Lobby and Conestoga Wood Specialties do not want to participate in a scheme established by the government for the provision of certain types of health care services. The history of the United States has seen many such attempts by individuals and corporations to avoid participation in government schemes on religious grounds, but this Court has repeatedly concluded that such claims have no merit, finding individual religious disapproval of government policy to be entitled to no more deference than political disapproval.

It has never been found that a corporation has the right not to participate in government policy based on the religious concerns of its owners. In many situations, even individuals are expected to place their religious convictions aside, when the participation required in an activity is sufficiently attenuated. While conscientious objectors may not be compelled to serve in the military, a similarly sought exemption from paying taxes to support the military has been repeatedly denied, even to Quakers whose sincere religious belief in pacifism is unquestioned. *Adams v. Commissioner*, 170 F. 3d 173 (3d Cir. 1999), *cert. denied* 528 U.S. 1117 (2000). In, *Adams*, the Third Circuit found that, despite the feasibility of exempting

individuals from tax payments, the government had a compelling interest in uniform collection of taxes, and refused to permit the sincere beliefs of Adams to excuse her from participation in societal responsibilities such as tax payments. 170 F.3d at 180-82.

Most commonly, this Court has faced these questions in the area of Social Security Administration. As described, *supra*, while Congress chose to grant an exemption from such taxes to self-employed Amish, whose religious beliefs required them to take care of their communities' elderly, such an exemption was not provided for Amish business owners to refuse to pay for the contributions to Social Security for their employees, *Lee*, 455 U.S. at 257, noting that "not all burdens on religion are unconstitutional." This Court denied the exemption, because "to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Id*. at 259. There, as here, the government instituted a scheme of general applicability and carved out certain exemptions on religious grounds. This Court recognized that the government was entitled to draw a line and limit the exceptions. *Id*. at 260. ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it is a violation of their faith to participate in the social security system.") Congress here has provided generous exemptions for churches and nonprofits with religious missions. It is not required to exempt everyone who desires to be exempted.

Participation in a government scheme to which a plaintiff had religious opposition was also required by this Court in *Bowen v. Roy*, 476 U.S. 693 (1986). Native American parents claimed that obtaining a

social security number for their daughter, Little Bird of the Snow, would violate their religion, and they should be able to continue receiving welfare benefits on her behalf without such a number. 476 U.S. at 695. Chief Justice Burger was dismissive of the idea that actions undertaken by the government, even when attached to the plaintiff's name, could create a religious burden. *Id*. at 700. ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.") The use of the number by the government "d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id*.

Like Roy, Hobby Lobby and Conestoga Wood Specialties seek an exemption from a generally applicable legal requirement. Like Roy's, their involvement in the allegedly religiously burdensome activity can only be seen as *de minimis*. Roy was required to provide his daughter's social security numbers on forms to claim food stamps. Hobby Lobby and Conestoga Wood Specialties are required to make available a third party insurance program where employees may spend their own wages and benefits, which may, at an indeterminate future date, result in a doctor issuing, and a pharmacist filling, a prescription for contraception methods opposed by the corporation's owners. If a burden on religion was not created in *Bowen, id*., despite the undisputed sincerity of the religious beliefs, it is very difficult to see how, in this more attenuated situation, an actionable burden can be found. As Justice Stevens noted, "the Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping." 476 U.S. at 716-17 (Stevens, J., concurring). Nor does it give

the right to dictate what legal products one's employees may purchase with their salaries, or to refuse to participate in a scheme where employees may make that choice.

IV. ANY EXEMPTION GRANTED WOULD BE IMPOSSIBLE TO CONTAIN WITHOUT FURTHER VIOLATIONS OF THE ESTABLISHMENT CLAUSE

A. The rationale of the Tenth Circuit would make all claimed religious burdens substantial

The Tenth Circuit dramatically shifted the burden of proof for cases under RFRA when it reinterpreted the meaning of the phrase "substantial burden." It created a false dichotomy when it described the alternative definitions that could apply: either a theological inquiry into whether a person's religion required or prohibited an activity; or an examination of "the intensity of the coercion applied by the government contrary to those beliefs." *Hobby Lobby*, 723 F. 3d at 1137. This arbitrary and unnecessary dichotomy creates major problems for analysis.

These are not the only two routes of investigation a court can undertake. While the Tenth Circuit was correct in its assertion that it is not the role of the judicial system to investigate the inherent truth or falsity of religious claims, this does not permit the logical leap that the only role for the court "is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure . . . to violate that belief." 723 F.3d at 1138. What the Court of Appeals here ignores, and what the government requested, is that the judicial system must investigate whether the belief is actually

affected by the government's action. As explained, *supra*, it is not. Limiting the court's investigation of 'substantial pressure,' as here, to a look at the penalties involved, 723 F.3d at 1141, while refusing to examine whether the government action at stake actually does involve the plaintiff in behavior that violates the asserted belief, is a recipe for chaos. Any and all government prohibitions would face challenge, and courts would be unable to reject such claims as long as the beliefs were found to be sincere, regardless of whether an objective observer would see any connection between the government's actions and the religious burden alleged.

Equally erroneous is the Tenth Circuit's analysis that "the interest here cannot be compelling because the [Mandate] presently does not apply to tens of millions of people." 723 F. 3d at 1143. This creates a Catch 22 for the government. On the one hand, RFRA requires it to create exemptions where substantial religious burdens are affected. Moreover, this Court has made clear that Congress has the authority to create such exemptions. *Smith*, 494 U.S. at 890. On the other hand, the creation of such an exemption for one group, according to the Tenth Circuit, indicates that the government never had a strong interest in the first place. A plaintiff could argue that similarly placed individuals were granted an exemption, thereby entitling that plaintiff to one. The Tenth Circuit, however, opens the door for that plaintiff to argue that because other, differently situated individuals and corporations (non-profits, small employers, those grandfathered in) have been granted an exemption, everyone is entitled to the same exemption.

B. Exemptions would abound throughout health care

The interaction between health care and religious beliefs is a common theme. As medical science and its techniques have developed, the areas where they can come into conflict with long standing religious tenets have expanded. Religious beliefs about the origin of personhood and end-of-life matters frequently come into conflict with rapidly changing medical capabilities. If this Court were to find a right under RFRA to an exemption for the profit-making corporations and their owners, here, the areas which will be impacted in health care are potentially unlimited.

This is particularly the case if, as the Tenth Circuit suggests, courts should look only to the sincerity of the individual's claimed belief. There is no doubt as to the sincerity of the beliefs that cause opposition to a wide range of medical treatment for people of varying religions. Jehovah's Witnesses, for example, have strong doctrinal opposition to blood transfusions. Under the same argument advanced by Hobby Lobby and Conestoga Wood Specialties, a business owner of that faith could request that his corporation be exempt from providing insurance that covers such transfusions. While, as here, the government could argue a compelling interest in the provision of insurance for such treatment, as it indeed has, it is hard to see how such an interest differs from the one in this case. Contraception and blood transfusions both provide a critically important role in overall health care, and individual employees would be equally put to the expense of obtaining private insurance policies were their employers' insurance not to cover them.

The list of potential exemptions to medical care does not stop with blood transfusions and contraceptives.

Adherents of the Church of Scientology oppose the use of psychiatry and many psychotropic medications, and could therefore seek exemptions to being required to cover such treatments. Many different religions oppose the use of all or some vaccines. While currently, the law frequently permits religious exemptions for individuals and their families from compulsory vaccine laws, a decision for Hobby Lobby and Conestoga Wood Specialties would permit corporations to refuse to cover such treatments for their employees. In areas where such vaccinations are compulsory, this would require employees to pay out of pocket for vaccinations in order to stay within the law. A Jewish or Islamic employer could seek to deny coverage for all medications containing pork-based gelatin products, provided the belief was sincere, regardless of the fact that Jewish and Islamic authorities have declared such medication to be religiously acceptable. As a most extreme possibility, a Christian Scientist employer could use any precedent set here to refuse to cover almost any medical care. As exemption after exemption piles up, the entire purpose of the ACA – reducing the number of underinsured and uninsured Americans – would be drastically undercut.

The sole defense the Tenth Circuit would grant the government to such a patchwork quilt of religious based exemptions is a case-by-case defense of compelling government interest. However, granting an exemption to anti-contraceptive Christian employers, and not to members of other religions or sects, for their personal religious based objections to health care, would itself fall foul of the Establishment Clause. It would be prioritizing one set of beliefs over others, the very behavior that the constitution forbids the government to undertake. To avoid such constitutional

violations, courts would be compelled to recognize any and all religious based objections to the provision of health insurance, leaving coverage for employees at the whim of their employers' chosen religion.

If the Tenth Circuit's argument on existing exemptions were taken to its logical conclusion, any religious group could point to the existing exemptions for any type of treatment, and use them to justify any exemption for any sincere religious belief whatsoever.

CONCLUSION

For the above reasons, this Court should affirm the judgment of the U.S. Court of Appeals for the Third Circuit and reverse the judgment of the U.S. Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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