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No. 13-354

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., PETITIONERS,

v.

HOBBY LOBBY STORES, INC., ET AL.

CONESTOGA WOOD SPECIALTIES CORP., ET AL., PETITIONERS,

v.

KATHLEEN SEBELIUS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT AND THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* [X] MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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STATEMENT OF INTEREST OF *AMICI CURIAE* *

Amici are Members of the United States House of Representatives, including Members who were in Congress when the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111–148, 124 Stat. 119,[1] was passed and who supported its passage, as

* *Amici* affirm that no counsel for a party to these proceedings authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

[1] As amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

well as Members who have voted repeatedly against efforts to repeal the ACA in whole or in part.[2]

As Members of Congress, *amici* have a substantial interest in explaining how the legislative history of the ACA supports the conclusion that the contraceptive coverage requirement of the ACA, codified at 42 U.S.C. 300gg-13, satisfies the test applicable to a free exercise of religion challenge under the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488. The ACA provisions challenged here should be upheld because the contraceptive coverage requirement does not substantially burden any free exercise rights that the for-profit corporations challenging the provisions may have, serves compelling governmental interests of advancing public health and welfare and promoting gender equality, and is the least restrictive means of accomplishing those compelling interests.

SUMMARY OF THE ARGUMENT

Amici believe that Hobby Lobby Stores, Inc., Mardel Inc., and Conestoga Wood Specialties Corp. ("the Corporations") do not have any free exercise rights under RFRA that may be asserted in these actions.[3] However, if this Court were to hold that the

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[2] A complete list of Members of Congress participating as *amici* appears as an Appendix to this brief.

[3] Because other *amicus* briefs, as well as the opening brief of the Solicitor General of the United States, address why the Corporations should not be able to assert a claim under RFRA, this brief will discuss solely the application of RFRA

Corporations may bring claims under RFRA challenging the contraceptive coverage requirement, those claims should be rejected for several reasons.

First, the text and legislative history of RFRA make clear that the right of free exercise of religion provides protection against the application of a generally applicable law, such as the contraceptive coverage requirement of the ACA, only if the law "substantially burdens" religious exercise by the person challenging the law's application. Congress added the word "substantially" to RFRA to make clear that RFRA was intended to incorporate and restore the test applied by this Court prior to its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), under which only governmental action that places a *substantial* burden on the exercise of religion must meet the compelling interest test. Congress did not intend that RFRA would "require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. S14352 (1993) (statement of Sen. Kennedy).

The contraceptive coverage requirement does not substantially burden any exercise of religion in which the Corporations might be found to engage because it does not compel the Corporations to administer or use the contraceptive methods to which they object, nor does it require them to adhere to, affirm, or abandon a particular belief. It merely

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to the ACA's contraceptive coverage requirement, in the event this Court reaches the substance of the Corporations' challenge to the ACA.

requires the Corporations, like other for-profit employers to provide comprehensive insurance coverage under which their employees may make their own personal decisions whether to use whatever form of contraception, if any, best suits their individualized health and wellness needs.

Second, the legislative history of the ACA demonstrates that the preventive care provisions of the ACA, including the contraceptive coverage requirement, were intended to serve compelling governmental interests by advancing the public health and welfare and promoting gender equality in availability of and insurance coverage of preventive healthcare to women. The contraceptive coverage requirement satisfies the least restrictive means test because Congress reasonably chose to use the existing private health insurance system to provide the types of preventive healthcare services that the Department of Health and Human Services determined, based on a thorough investigation and report by the Institute of Medicine, are necessary and appropriate to serve the compelling government interests of public health and welfare and gender equality.

Third, the contraceptive coverage requirement properly balances Congress' compelling interests in enacting the preventive care provision, any burden of that requirement on for-profit corporation and the right of such corporations' female employees. The importance of the contraceptive care requirement in serving the important governmental goals of public health and welfare and gender equality far outweighs whatever attenuated imposition this

provision may place on any right of free exercise that the Corporations may possess. In addition, acceptance of the Corporations' claims would improperly restrict the rights of their employees under federal law.

ARGUMENT

I. The Contraceptive Coverage Requirement Does Not Impose a Substantial Burden on the Exercise of Religion.

RFRA reflects Congress' reasoned conclusion that the right of free exercise of religion provides protection against the application of a generally applicable law if and only if the law "substantially burden[s]" religious exercise by the person challenging application of the law. 42 U.S.C. 2000bb-1(a). Congress' original draft of RFRA did not contain the word "substantially" as a modifier to the type of burden that would exempt an individual from generally applicable law; this word was added in an amendment offered by Senators Kennedy and Hatch to clarify the intended meaning of the proposed statute. *See* 139 Cong. Rec. S14352 (1993).

In proposing the amendment adding the word "substantially" to RFRA's text, Senator Kennedy made clear that RFRA "does not require the Government to justify every action that has some effect on religious exercise." *Id.* Rather, the amendment was proposed to ensure that Congress faithfully restored the compelling interest test applied by this Court prior to its decision in *Employment Division, Dep't of Human Res. of*

Oregon v. Smith, 494 U.S. 872 (1990). Senator Kennedy explicitly referred to "[p]re-*Smith* case law which makes it clear governmental action [that] places a *substantial* burden on the exercise of religion . . . must meet the compelling interest test set out in [RFRA]." 139 Cong. Rec. S14352 (emphasis added).

The ACA's preventive care coverage requirement, 42 U.S.C. 300gg-13, as interpreted through the relevant HHS regulations, does not place a substantial burden on the religious exercise of for-profit corporations whose owners have religious objections to the use of certain contraceptives. Although RFRA prohibits courts from inquiring into whether a particular belief is valid or "central" to a plaintiff's "system of religious belief," 42 U.S.C. 2000cc-5(7)(A), thereby incorporating the rule of *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981), not every statute or regulation that affects religious beliefs "substantially burdens" the free exercise of religion. *See United States v. Lee*, 455 U.S. 252, 261 (1982) ("Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.").

A. Any Connection between the Corporations' Religious Exercise and Their Employees' Choice of Contraception Is Too Attenuated to Constitute a Substantial Burden.

The ACA preventive care provision does not compel the Corporations to administer or use the contraceptive methods to which they object, nor does it require them to adhere to, affirm, or abandon a particular belief. Any burden here is therefore unlike the compulsory flag salute held unconstitutional in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630–633 (1943) ("[T]he compulsory flag salute and pledge requires *affirmation of a belief* and an attitude of mind." (emphasis added)).

Rather, the ACA requires only that large for-profit employers provide comprehensive insurance coverage under which their employees may decide in private consultation with their doctors to use the particular form of contraception that best suits their individualized health and wellness needs. That this private choice of an individual employee may differ from what the shareholders of her corporate employer would themselves choose is too tenuous a burden to meet RFRA's codification of the pre-*Smith* substantiality requirement. *See generally Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (upholding exclusion of the purchase of certain Scientology services from charitable tax deduction and noting that the Court had "doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one.").

Any burden these employers feel as a result of paying a third party (an insurance company) to provide comprehensive insurance coverage, including coverage of contraception, to other third parties (the

corporation's employees) cannot be said to impose a substantial burden on the *employer's own* exercise of religion, which is unaffected by the provisions at issue. Indeed, for-profit corporate employers remain free to state their objections to the use of contraceptives, and they may never even know whether any of their employees uses contraception to which they object. *See* 78 Fed. Reg. 39878 (July 2, 2013) ("[N]othing in these final regulations precludes employers or others from expressing any opposition to the use of contraceptives or requires health care providers to prescribe or provide contraceptives, if doing so is against their religious beliefs."); *id.* at 39879 ("Plan participants and beneficiaries may refuse to use contraceptive services.").

The action the corporations protest—providing health insurance—is also not a substantial burden on religious exercise because it results from Congress regulating "a secular activity" rather than requiring or prohibiting actions grounded in a religious belief. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).[4] The requirement to provide comprehensive insurance that includes contraception that an employee may—or may not—choose thus fails to meet the most basic requirement of a free exercise claim: the existence of "any coercion directed at the practice or exercise of [the claimant's religious beliefs." *Tilton v.*

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[4] Some *amici* believe that the statute at issue in *Braunfeld* represented an unconstitutional establishment of religion. *See Estate of Thorton v. Caldor*, 472 U.S. 703 (1985). However, *Braunfeld* did not directly consider the Establishment Clause, and no such claim is presented here.

Richardson, 403 U.S. 672, 689 (1971) (plurality opinion); *see also Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment *as it operates against him in the practice of his religion*." (emphasis added)).

Because requiring coverage of contraceptives imposes no obligation that the Corporations *themselves* act in a manner contrary to their religious beliefs, their religious exercise is not substantially burdened.

B. The ACA's Penalties for Non-Compliance with the Preventive Care Provision Also Do Not Impose a Substantial Burden.

As noted, this Court's jurisprudence prior to *Smith*, expressly ratified and adopted by RFRA, 42 U.S.C. § 2000bb(b), was most protective of individuals' religious exercise rights when claimants sought to prevent the government from compelling adherence to or affirmance of a particular belief and where providing an accommodation would not affect the rights of others. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630–633 (1933). But even a religious duty is not automatically valid grounds for a free exercise challenge, if that duty requires conduct contrary to public welfare. In keeping with Congress' understanding that RFRA created no new rights for any religious practice or for any potential litigant, it was noted during the debates leading to its passage that "[n]ot every free exercise claim will prevail." Cong. Rec. [X], S9822 (July 2, 1992).

The ACA's preventive care provision offers the Corporations the option of paying a civil fine and not providing the otherwise required coverage. Even if such a civil fine might be sizeable, it cannot be considered more burdensome than the criminal convictions this Court found did not impose a substantial burden in *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding a statute criminalizing labor by girls under the age of 18 despite contrary religious beliefs that such labor is a religious duty); *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989).

II. The Contraception Coverage Requirement Fulfills Compelling Governmental Interests in Promoting Public Health and Gender Equality, and Is the Least Restrictive Means of Doing So.

Congress enacted RFRA to reinstate the compelling interest test as it was applied before this Court's decision in *Smith*. *See* H.Rep. No. 103-88, at 6 (1994) (finding that RFRA "restores the compelling interest test previously applicable to First Amendment Free Exercise cases."). Under the compelling interest test, courts analyzing an alleged RFRA violation should "look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling government interest." *Id.*

This Court has repeatedly affirmed Congress' prerogative to enact comprehensive national

legislation aimed at improving the public welfare, most notably in *United States v. Lee*, 455 U.S. 252 (1982), which upheld the Social Security system's imposition of a tax in the face of religious objections. Because the ACA's contraceptive coverage requirement, an integral part of the statute's overall emphasis on preventive care, furthers Congress' compelling interest in addressing the public health and welfare, and additionally addresses a compelling interest in promoting gender equality in the health insurance market, this Court should hold that Congress has satisfied RFRA's requirement of furthering a compelling government interest, in the event that this Court reaches that question.

A. The Contraception Coverage Requirement Is Part of a Nationwide Program of Comprehensive Preventive Care That Furthers Compelling Government Interests in Public Health and Gender Equality.

Congress enacted the ACA to protect public health and welfare by ensuring that every American has access to affordable and high quality healthcare. This Court has recognized the importance of such broad public welfare programs in other contexts. In *Lee*, this Court treated as obvious the fact that a national Social Security program furthered compelling interests: "[b]ecause the social security system is nation-wide, the governmental interest is apparent." 455 U.S. at 258. In language that also reflects Congress's intent in passing the ACA, the *Lee* Court went on to hold that "[t]he social security system in the United States serves the public interest by providing a comprehensive insurance

system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.*

Through the ACA, Congress provided for an improved private health insurance program of which preventive care is a crucial part. The preventive services requirements, including comprehensive contraceptive coverage, not only serve the general interest of promoting public health and welfare, they also remedy what Congress recognized as widespread gender inequality in the provision and cost of healthcare services to women. Because Congress recognized that preventive care provides a tremendous benefit and a unique means of addressing critical health care problems, the ACA required newly issued health insurance plans to cover these health services pursuant to a set of administratively implemented regulations.

This Court has long considered the goals of advancing public health and welfare and eliminating gender inequality to be compelling governmental interests. *See, e.g.*, *Simopoulas v. Virginia*, 42 U.S. 506, 511 (1983) (finding a "compelling interest in maternal health"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (finding a "compelling interest in eradicating discrimination against its female citizens"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (same); *see also Bill Johnson's Rests. Inc., v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 732 (1983) (recognizing the need to balance First Amendment rights with "the States' compelling interests in maintaining domestic peace and protecting its citizens' health and

welfare"). Congress articulated these interests as important goals of preventive care, and contraceptive coverage specifically, throughout the ACA's legislative history.

1. Congress required comprehensive preventive care for women in the ACA because of the important role that prevention plays in enhancing public health.

The legislative history of the ACA emphasizes the crucial role of preventive services in a comprehensive universal healthcare system. As Senator Franken noted, "[p]revention is one of the key ways [the ACA] will transform our system of sick care into true health care." 155 Cong. Rec. S12, 271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken).

In particular, Congress highlighted the importance of covering *women's* preventive care, including contraception, in promoting public health and welfare. The portion of the ACA that called for women's preventive care was added through the "Mikulski Amendment" to fill gaps in existing preventive services when it came to women's health care needs. *See* 155 Cong. Rec. S12,265, S12,277. Congress recognized that increasing access to a wide range of services would remedy "a situation where many women are delaying going to a doctor, getting their preventive services . . . ." 155 Cong. Rec. S12,021, 12,025 (Dec. 1, 2009) (statement of Sen. Boxer). Senator Boxer explained that "[t]he Mikulski amendment addresses this critical issue by requiring that all health plans cover comprehensive women's

preventive care and screening – and cover these recommended services at little or no cost to women. These health care services include . . . family planning services." *Id.*

As Congress recognized, men and women have different needs when it comes to preventive care in the context of reproductive services. The coverage of women's preventive health services under 42 U.S.C. 300gg-13 was considered a crucial tool for accomplishing the overall goal of providing complete preventive care, because Congress understood that inadequacy of preventive services disproportionately affects women. *See* 155 Cong. Rec. at S12,027 (daily ed. Dec. 1, 2009) ("The prevention section of the bill before us must be amended so coverage of preventive services take into account the unique health care needs of women throughout their lifespan.") (statement of Sen. Gillibrand); s*ee also* 156 Cong. Rec. H. 1632 (Mar. 18, 2010) (statement of Rep. Jackson Lee) ("So I stand today to be able to say to all of the moms and nurturers who happen to be women that we have listened to your call. We have actually recognized that it is important to provide for care. . . .").

Access to contraception, as part of a comprehensive program of preventive coverage, promotes women's general well-being and prevents illness. Senator Durbin emphasized the importance of the ACA's preventive services for women of childbearing age, noting, "Today, there are 17 million women of reproductive age in America who are uninsured. This bill will expand health insurance coverage to the vast majority of them, which means

millions more women will have access to affordable birth control and other contraceptive services. This expanded access will reduce unintended pregnancies and reduce abortions." 155 Cong. Rec. S. 12664, 12671 (Dec. 8, 2009) (statement of Sen. Durbin).

Representative Kaptur also linked the ACA's preventive care provisions for women with children's health, stating, "This legislation will help millions of women obtain health coverage and thus reduce abortion by enhancing broad coverage options for women's and children's health. It will vastly improve preventive care . . . ." 156 Cong. Rec. H. 1891, 1893 (Mar. 21, 2010) (statement of Rep. Kaptur).

2. Congress also required comprehensive preventive care for women to address serious gender inequality in health care.

Members of Congress repeatedly stressed their intent to combat gender discrimination and promote equality through the ACA's comprehensive health insurance system generally and its preventive care provisions specifically. Representative Speier highlighted this intent when she declared, "If there ever was an issue on health care that must be addressed and is addressed in [the ACA], it is gender discrimination." 156 Cong. Rec. H. 1706, 1711 (Mar. 19, 2010) (statement of Rep. Speier).

Senator Franken linked gender equality and preventive care when he stated, "We will end discrimination based on health history, on gender, or history of domestic violence. We will provide access to preventive health services . . . ." 155 Cong. Rec. S.

12565, 12611 (Dec. 7, 2009) (statement of Sen. Franken). Senator Gillibrand also focused on gender inequalities in the health care system while advocating for the ACA and its preventive care provisions in particular, stating, "This fundamental inequity in the current system is dangerous and discriminatory and we must act. 155 Cong. Rec. at S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

Congress explicitly set out to change the health insurance system in which "women have been discriminated against for decades," 156 Cong. Rec. H. at 1711 (statement of Rep. Speier), by providing "access to preventive care, mammograms and other screenings and a *full range of reproductive services*." *Id.* at 1709 (statement of Rep. Edwards) (emphasis added). The disproportionate burden borne by women in out-of-pocket costs for health care, including preventive care, was a particular focus of Congress. In noting the need for change, Representative Chu stated, "Today, women are forced to settle for less health care at a higher price. We pay as much as 50 percent more than men, a practice of discrimination that is legal in 38 states." 155 Cong. Rec. H. 12209 (Nov. 3, 2009) (statement of Rep. Chu). *See also* 155 Cong. Rec. S11,985 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("Women are more likely than men to neglect care or treatment because of cost. Fourteen percent of women report they delay or go without health care. Women of childbearing age incur 68 percent more out-of-pocket health care costs than men . . . ."); 155 Cong. Rec. at S12,274 (daily ed. Dec. 3, 2009) (statement of Sen. Murray) ("In fact we know that in

2007, a quarter of women reported delaying or skipping their health care because of cost. In May of 2009, just 2 years later, a report by the Commonwealth Foundation found that more than half of women today are delaying or avoiding preventive care because of its cost."); 155 Cong. Rec. S. 10262, 10263 (Oct. 8, 2009) "[M]illions of women across this country [] open the mail each month to see their premiums rising dramatically, [and] cannot get preventive care . . . ." (statement of Sen. Gillibrand).

Senator Shaheen argued that the insurance system needed regulation to end its discriminatory practices, noting, "[I]t is unacceptable that women are not treated fairly by the system and do not always receive the care they require and deserve . . . We must come together to pass comprehensive health reform to help all the women of our Nation who are facing high insurance costs just because they are women." 155 Cong. Rec. S. 10262, 10264 (Oct. 8, 2009) (statement of Sen. Shaheen).

The ACA sought to end this harmful inequality by ensuring complete health care, including preventive care, for women. Because of obvious biological differences, women have medical needs that differ from men. All prescription contraceptives on the market today, such as the Pill, diaphragms, and IUDs, are for women alone. Before the ACA, insurance companies often charged women high rates or refused to cover necessary, but uniquely female, services.

Senator Mikulksi summarized this compelling interest to be served by the ACA as follows: "What you heard loudly and clearly today is that health care is a women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue because what we demonstrated is that when it comes to health insurance, we women pay more and get less." 155 Cong. Rec. S. 10262, 10265 (Oct. 8, 2009) (statement of Sen. Mikulski).

3. The contraceptive coverage requirement is a critical part of the preventive services required by Congress in the ACA.

The Mikulski Amendment required the Department of Health and Human Services ("HHS") to identify those preventive health services that should be covered and provided to patients at no cost. *See* 42 U.S.C. 300gg-13. HHS requested that the Institute of Medicine ("IOM"), a part of the National Academy of Sciences, provide recommendations as to the appropriate scope of required coverage.

The IOM "convened a committee of 16 members—including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines—to develop a set of recommendations for consideration by the ASPE of HHS." *Id.* at 2. After extensive study, including several public hearings, the IOM issued its report to HHS on July 19, 2011. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011) ("IOM Report").

The IOM Report identified eight categories of treatment that should be required to be covered as part of preventive care, including access to the "full range" of contraceptive methods approved by the Food and Drug Administration ("FDA"). *Id.* at 10, 102–110. As the IOM Report makes clear, access to contraception plays a key role in safeguarding women's health and the health of their children by, among other things [ensuring pregnancies are adequately spaced, other benefits? . . . . See IOM Report at 102–103. **Need to fill this in.**] Access to contraception helps prevent unwanted pregnancies, which can have negative physical and psychological effects on women and children. [CITE IOM at ___ (QUOTE)] In February 2012, HHS adopted all eight of the IOM Report's recommended preventive services for women in its implementing final rule. 77 Fed. Reg. 8725-8726 (Feb. 15, 2012). **[Have we confirmed this date, per Heather's question?]**

Dr. Linda Rosenstock, Dean of the UCLA School of Public Health and Chair of the IOM Committee on Preventative Services for Women, testified before the House Judiciary Committee in February 2012 about the findings of the IOM Report. Testimony of Linda Rosenstock before the House Judiciary Committee, 2012 WL 624905 (Feb. 28, 2012). She noted that "[t]he report addressed concerns that the current guidelines on preventive services contain gaps when it comes to women's needs. Women suffer disproportionate rates of chronic disease and disability from some conditions. Because they need to use more preventive care than men on average due to reproductive and gender-specific conditions, women face higher out-of-pocket costs. *Id.*

HHS's final recommendations and the IOM Report are fully consistent with, and important in carrying out, Congress' intent in passing the ACA: not only to provide treatment for preexisting illnesses, but also to improve the health of Americans by ensuring the complete coverage of preventive care. The preventive services provisions of the ACA—including the contraceptive coverage provisions challenged by the Corporations—thus further a compelling government interest in improving and sustaining public health and welfare by increasing access to preventive care and thereby eliminating many medical problems before they arise.

B. The ACA's Preventive Coverage Requirements and the Final Rule Issued by HHS Embody the Least Restrictive Means of Achieving Congress' Intent.

Congress chose to accomplish its goal of improving healthcare through a comprehensive national insurance program utilizing the existing system of private health insurance. This method was the most effective and the simplest means by which Congress could achieve its objective of instituting comprehensive care. H.R. Rep. No. 111-443, pt. 2, at 984–88 (2010). The final preventive services rule issued by the Departments of the Treasury, Labor and HHS noted that the government examined various alternatives but found that these methods would not advance the government's compelling interest in the same sufficiently tailored way as the final regulations. *See* 78 Fed. Reg. 39870 (July 2, 2013. "[T]he Affordable Care Act contemplates providing coverage of recommended preventive

services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles. Imposing additional barriers to women receiving the intended coverage (and its attendant benefits), by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." *Id.*

Permitting for-profit employers to opt out of including insurance coverage for particular services required under the ACA and requiring the government to provide that care separately would undermine the comprehensive system that Congress envisioned. Forcing individual employees to obtain financing of certain types of care from different sources, rather than the comprehensive insurance plans envisioned by the ACA, would add unnecessary complication and confusion. Moreover, requiring the government to devise and implement a new system through which it distributes certain preventive services would be far more burdensome than the ACA's strategy of building upon the preexisting private system. Such an imposition on the federal government would be unprecedented and cannot be reconciled with the applicable case law under RFRA. *See Braunfeld*, 366 U.S. at 608.

As in *Lee*, the Court should conclude that the administratively created exemptions for private individuals and religious organizations reflect sufficient accommodation of religious exercise rights in light of the interference with compelling governmental interests that would result if all potentially similarly situated for-profit employers

could unilaterally exempt themselves from this comprehensive national program.

III. The Contraceptive Coverage Requirement Meets RFRA's Standard Because It Appropriately Balances All Relevant Interests.

This Court and others have acknowledged the problems that would arise if broad, *ad hoc* religious accommodations were permitted to undermine the compelling governmental interest that led Congress to pass a statute. Thus, prior to *Smith*, this Court subjected laws purportedly burdening the free exercise of religion to a balancing test, weighing the government's stated compelling interests, the claimant's free exercise right and the rights of third parties that might be affected by the requested accommodation. RFRA reinstated this delicate balancing test.

In *Lee*, for example, this Court balanced the government's interest in "providing a comprehensive insurance system with a variety of benefits available to all participants" against the burden that system placed on an individual's right to free exercise. 455 U.S. at 258. The Court noted that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept *on their own conduct* as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261 (emphasis added). The *Lee* Court balanced the countervailing interests of recognizing individual religious beliefs and the need for those engaged in commercial enterprises to "yield to the common

good," *id.* at 259, and concluded that the public interest furthered by the Social Security system was of such a high order that conflicting religious beliefs "afford[ed] no basis for resisting the tax." *Id.* at 260.

In balancing the competing interests in *Lee*, this Court noted that Congress had already "accommodated [religion], to the extent compatible with a comprehensive national program." *Id.* Such accommodations indicated the intent of Congress not to interfere unduly with religious exercise while simultaneously not allowing that private exercise to interfere unduly with matters of public concern. As the Court explained, "[r]eligious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature." *Id.* at 259 (internal citations and quotations omitted); *see also United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (considering "the extent to which accommodation of defendant would impede the state's objectives"). *Id.*

Here, the statutory scheme enacted by Congress and implemented through administrative regulations requires employers to provide—along with coverage for a vast array of other forms of medical care—comprehensive contraceptive coverage so that women can access the care they and their doctors believe best. The implementing regulations have provided certain exceptions for non-profit religious groups that object to the contraception coverage requirement. *See* 45 C.F.R. 147.131(a). These exemptions ensure the regulation is narrowly tailored while still serving Congress' goal of providing comprehensive

preventative coverage to as many American women as possible.

Such exemptions do not undermine the compelling nature of the governmental interests in comprehensive health care. Rather, they reflect a careful effort to accommodate free exercise rights and religious beliefs.

Acceptance of the Corporations' argument would allow any employer to use its religious beliefs (including those that would undermine large portions of federal law, like the religious belief that taking *any* medicine violates religious duties) to circumscribe the rights of its employees—a result that is squarely at odds with this Court's well-established jurisprudence and therefore with RFRA.[5] Pre-*Smith* case law treated free exercise claims that were inherently personal and affected no other parties, as in *Barnette*, 319 U.S. at 630, as more viable than claims that would deny others access to their rights under federal law.

Because the Corporations seek to upset the balance crafted by Congress—a balance that

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[5] Moreover, in order to accept the argument of the Corporation, this Court would have to look through the corporate form to consider the religious beliefs of a corporation's shareholders as relevant to the analysis of the corporation's free exercise interests. Unless the Court is willing to pierce the corporate veil in contravention of well-established corporate law, the religious views of corporate owners are irrelevant to the substantial burden analysis here. *See, e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

appropriately respects religious exercise while promoting the rights of women to necessary and appropriate health care—they should not be granted a judicial exception to the contraceptive coverage requirement.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reject the challenges of the Corporations to the ACA's contraceptive coverage requirement.

Respectfully submitted,

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APPENDIX

LIST OF PARTICIPATING *AMICI*

The Members of the United States House of Representatives participating as *amici* are:

(Names To Come)