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 Petition for a 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

BRIEF FOR RESPONDENTS

The government's petition contends that 1) the issues presented here are important, 2) the lower federal courts are divided, and 3) the decision below is incorrect. The government is correct on two out of its three contentions. The issues presented in the government's petition are indeed important, and the circuits are now hopelessly divided on critical questions of standing and religious liberty. However, Respondents respectfully suggest that the considered decision of the en banc Tenth Circuit Court of Appeals is correct. Nonetheless, Respondents agree with the government that, in light of the importance of the issues and the division in the circuits, plenary review by this Court is warranted.

STATEMENT

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.[1]

a. 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 with thirty-five stores and about 400 full-time employees. Hobby Lobby and Mardel remain closely held family businesses,

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[1] The undisputed material facts are taken from Respondents' Verified Complaint. App. 64a.

organized as general corporations under Oklahoma law, and exclusively controlled by the Greens. App. 7a-8a, Verified Compl. ("VC"), ¶¶ 23, 24, 32-38.[2]

b. "The Greens have organized their businesses with religious principles in mind." App. 8a. In Hobby Lobby's official statement of purpose, the Greens commit to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id.* 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." *Id.* The Greens each sign a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA 21a.[3]

"[T]he Greens allow their faith to guide business decisions for both companies." App. 8a. For example, all 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."[4] Store music features

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[2] For federal tax purposes, Hobby Lobby is a subchapter-S corporation. App. 7a-8a.

[3] As the court of appeals explained, "[t]he Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles." App. 8a.

[4] A recent ad invites readers to "call Need Him Ministry at 1-888-NEED-HIM" if they "would like to know Jesus as Lord and

Christian songs. Employees have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. Company profits provide millions of dollars every year to ministries. App. 8a; VC ¶¶ 39-43, 45, 47, 51.

The Greens and their businesses also refrain from business activities forbidden by their religious beliefs. For example, to avoid promoting alcohol, Hobby Lobby does not sell shot glasses. The Greens once declined a liquor store's offer to take over one of their building leases, costing them hundreds of thousands of dollars a year. Similarly, the Greens do not allow their trucks to "back-haul" beer and so lose substantial profits by refusing offers from distributors. App. 8a; VC ¶44.

c. In the same way, the Greens' faith affects the insurance they offer in Hobby Lobby's self-funded health plan. The Greens 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 the practice of abortion. App. 50a-51a. Hobby Lobby's health plan therefore excludes drugs that can terminate a pregnancy, such as RU-486. The plan also 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 the Greens discovered that two of these drugs had been included—without their knowledge—

Savior." *See* http://www.hobbylobby.com/assets/images/holiday_messages/messages/2013e.jpg (last visited Oct. 21, 2013).

in the plan formulary, they immediately removed them.[5]

2. The Patient Protection and Affordable Care Act ("ACA") requires non-grandfathered group health plans to cover without cost-sharing a variety of preventive services, including "preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(1)-(4); Pet. 3-8. That latter category has been defined by regulation to include items such as well-woman visits, gestational diabetes screening, testing and counseling for certain sexually-transmitted diseases, and breastfeeding support, supplies, and counseling. *See* Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Oct. 21, 2013) ("HRSA Guidelines"). As relevant here, the regulation also requires plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA Guidelines; *see also* 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). The government refers to this as the "contraceptive-coverage requirement." Pet. 8.

a. The contraceptive-coverage requirement includes drugs and devices—namely, Plan B, Ella, and two intrauterine devices—which, the

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[5] The district court found this was not "due to anything other than a mistake. Upon discovery of the coverage, Hobby Lobby immediately excluded the two drugs, Plan B and Ella, from its prescription drug policy. [The government does] not dispute that the company's policies have otherwise long excluded abortion-inducing drugs." App. 174a.

government concedes, may prevent an embryo from implanting in the womb. Pet 10 n.5 (noting, by reference to the FDA *Birth Control Guide*, that these drugs and devices may prevent "attachment" or "implantation" of an embryo "in the womb"); App. 10a. Given the government's concession and the FDA's guidance, the court of appeals found "no material dispute" over how these drugs and devices function. App. 10a n.3. And given their beliefs, Respondents cannot cover them without facilitating what they believe to be an abortion. App. 50a-51a. Respondents do not object to covering any of the sixteen other forms of FDA-approved contraceptives,[6] but they cannot cover these four methods without violating their faith. App. 14a-15a.

Noncompliance, however, would expose Respondents to severe fines, regulatory action, and lawsuits. 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1185d, 1132; *see also* Pet. 3 n.3 (noting enforcement mechanisms). Continuing to offer a health plan without the four objectionable items would subject Hobby Lobby to a fine of $100 per day for each

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[6] Those 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. *See* FDA *Birth Control Guide* (May 2013), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. The contraceptive-coverage requirement does not include contraceptive methods used by men. *See* 78 Fed. Reg. 39870, 39870 & n.1 (July 2, 2013) (noting "HRSA Guidelines exclude services relating to a man's reproductive capacity, such as vasectomies and condoms").

"individual to whom such failure relates." 26 U.S.C. § 4980D. Given that over 13,000 individuals are insured under Hobby Lobby's plan, this fine could total "at least $1.3 million per day, or almost $475 million per year." App. 15a. If Hobby Lobby instead drops employee insurance altogether, it will face severe disruption to its business, significant competitive disadvantages in hiring and retaining employees, as well as penalties totaling $26 million per year. *Id.*; VC ¶ 144; 26 U.S.C. § 4980H.

b. "A number of entities"—both religious and non-religious—"are partially or fully exempted from the contraceptive-coverage requirement." App. 11a.

First, the regulation recognizes the religious sensitivity of contraceptive coverage by providing that HHS "may establish exemptions" for plans "established or maintained by religious employers * * * with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); App. 11a. Consequently, HHS has exempted "churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order." App. 11a-12a. Other religious groups who object to insurance on principle and members of "health care sharing ministries" are exempt from the ACA altogether, and therefore by definition are not subject to the contraceptive-coverage requirement. 26 U.S.C. § 5000A (d)(2)(A), (B), (ii).

Second, HHS recently finalized an "accommodation" for certain non-exempt religious organizations allowing them to route contraceptive payments through their insurer or plan

administrator. Pet. 8 (citing 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39870); App. 12a. Through this alternative mechanism, HHS seeks to "protect[ ] certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage." 78 Fed. Reg. at 39872. The accommodation, however, "does not extend to for-profit organizations." *Id.* at 39875.

Third, wholly apart from any religious concerns, "grandfathered" plans may indefinitely avoid the contraceptive-coverage requirement by not making certain changes after the ACA's effective date. *See* 42 U.S.C. § 18011 (a)(2) ("Preservation of right to maintain existing coverage"); App. 12a-13a. While they must comply with other ACA requirements—such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods (42 U.S.C. § 18011(a)(4); *see* 75 Fed. Reg. 34538, 34542 Tbl. 1 (June 17, 2010))—grandfathered plans need not cover contraceptives or any other women's preventive services. 75 Fed. Reg. 34540. When promulgating the current grandfathering regulations in 2010, HHS estimated that 34% of small employer and 55% of large employer plans would retain grandfathered status in 2013. *See id.* at 34552 Tbl. 3.

Fourth, "small employers"—that is, those with fewer than 50 employees, who collectively employ over 34 million people—need not offer health insurance at all. 26 U.S.C. § 4980H(c)(2); WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* 1 ("*ACA Small Business*"), http://www.whitehouse

.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Oct. 21, 2013). To that extent, small employers "do not have to comply with any aspect of the shared responsibility health coverage requirements, including the contraceptive-coverage requirement." App. 13a.

As a result of these various exemptions, the contraceptive-coverage requirement does not apply to a large percentage of the American workforce. *See, e.g.*, App. 58a (finding "the contraceptive-coverage requirement presently does not apply to tens of millions of people"); Appellees' Br. at 40 n.11 (conceding that "48 percent" of all Americans who receive health coverage through their employers "were in grandfathered health plans in 2012"); *see also, e.g., Beckwith Elec. Co.* v. *Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013) (noting that, with respect to grandfathered plans, "[t]he government's best case scenario * * * still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate").

c. Despite their sincere religious objections to facilitating the provision of abortifacients, Respondents do not qualify for any of these exceptions. Hobby Lobby's health plan is not grandfathered, [7] and, having more than 50 employees, it must offer insurance covering all mandated services. 26 U.S.C. § 4980H. As for-profit

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[7] The plan lost grandfather status due to changes made before the contraceptive-coverage requirement was proposed. VC ¶59; App. 14a.

businesses, neither Hobby Lobby nor Mardel is covered by the religious employer exemption or the accommodation. App. 13a-14a. Consequently, Respondents must either violate their faith by covering the mandated contraceptives, or pay crippling fines that would destroy their livelihood.

3. Petitioners accurately set forth the procedural history of this case. Pet. 10-11. In brief: Respondents sued under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 20000bb *et seq.*, which provides that the government "shall not substantially burden a person's religious exercise" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b).[8] After being denied a preliminary injunction and emergency appellate relief, Respondents were granted initial en banc review by the Tenth Circuit, which heard argument before eight judges on May 23, 2013. App. 15a-16a. On June 27, the en banc court reversed the district court. *Id.* 5a-7a.

a. As a preliminary matter, the court unanimously concluded that Hobby Lobby and Mardel have Article III standing and that their claims are not barred by the Anti-Injunction Act, 26 U.S.C. § 7421. App. 17a-18a, 18a-21a; *see* Pet. 12 (noting government's agreement with both conclusions). The court therefore did not address whether the Greens could sue individually under RFRA, although that issue was thoroughly briefed and argued. App. 18a n.4.

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[8] Respondents also sued under the First Amendment and the Administrative Procedure Act. App. 15a-16a.

On the merits, in an opinion by Judge Tymkovich, a five-judge majority ruled that Hobby Lobby and Mardel had demonstrated a likelihood of success on their RFRA claims.

i. The majority first addressed the question of whether Hobby Lobby and Mardel are "persons" capable of engaging in the "exercise of religion" under RFRA. App. 23a. Because RFRA does not define "person," the court turned to the Dictionary Act, which provides that "unless the context indicates otherwise," the word "person" in federal law "includes corporations * * * as well as individuals." 1 U.S.C. § 1; App. 24a. Thus, the majority concluded that "the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a. The court rejected the government's "strained" argument that RFRA silently "carried forward" an exclusion of for-profit entities found in other statutes, such as the exemptions in Title VII and the ADA. App. 26a-27a; *cf, e.g.,* 42 U.S.C. § 2000e-1(a) (exempting "a religious corporation, association, educational institution, or society").

The court also rejected the government's argument that RFRA silently includes a background principle, supposedly found in the First Amendment, which distinguishes "non-profit, religious organizations [from] for-profit, secular companies." App. 33a. After extensive analysis, *see id.* 34a-43a, the majority concluded that the government's "position is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." *Id.* 36a (internal citation omitted). Moreover, excluding

Hobby Lobby and Mardel from RFRA would be particularly inappropriate, since the companies publicly "express themselves for religious purposes," are "closely held family businesses with an explicit Christian mission as defined in their governing principles," "ma[k]e business decisions according to [religious] standards," and (in Mardel's case) "directly serve a religious community." *Id.* 37a, 39a, 42a.

ii. The court next considered whether the contraceptive-coverage requirement imposed a "substantial burden" on Hobby Lobby and Mardel's exercise of religion. App. 44a-56a. Drawing on this Court's decisions in *Thomas* v. *Review Bd.*, 450 U.S. 707, 717-18 (1981), and *United States* v. *Lee*, 455 U.S. 252, 257 (1982), the court held that it must consider three questions: first, it must "identify the religious belief" in question; second, it "must determine whether this belief is sincere"; third, it must determine "whether the government places substantial pressure on the religious believer" to act contrary to those beliefs. *Id.* 50a-51a.

In this case, the religious belief in question was Respondents' belief that by providing insurance coverage for contraceptives that could prevent a human embryo from implanting in the uterus, they themselves would be morally complicit in "the death of [an] embryo." *Ibid.* Because "[t]he government d[id] not dispute the corporations' sincerity," the court saw "no reason to question it either." *Ibid.* And given the fact that Hobby Lobby and Mardel were faced with the choice of "compromis[ing] their religious beliefs, pay[ing] close to $475 million more in taxes every year, or pay[ing] roughly $26 million

more in annual taxes and drop[ping] health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial." *Id.* 51a-52a.[9]

The court rejected the government's argument that the burden was too attenuated, and therefore insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer. *Id.* 44a; Pet 26-27. Such reasoning is "fundamentally flawed," the court said, 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." App. 44a (emphasis omitted).

iii. Having found a substantial burden, the court then applied strict scrutiny. *Id.* 56a-61a. As to whether the contraceptive-coverage requirement furthered a compelling interest, the court reasoned that the government's asserted interests in "public health and gender equality," were not compelling "because they are broadly formulated," and because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants.' " *Id.* 57a-58a (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Additionally, the government's interests could not be compelling because, under various exemptions and accommodations, "the contraceptive-coverage

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[9] Judge Hartz concurred on the substantial burden point. He found that the contraceptive-coverage requirement imposes a substantial burden simply because it "compels the corporations to act contrary to their religious beliefs." App. 75a-76a.

requirement presently does not apply to tens of millions of people." App. 58a.

Finally, the court found that requirement failed the least restrictive means test because—in light of the fact that Hobby Lobby and Mardel "ask only to be excused from covering four contraceptive methods out of twenty"—the government "does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Id.* 59a-60a.[10]

b. In a separate concurrence, Judge Gorsuch, joined by Judges Kelly and Tymkovich, would have found that the Greens themselves, and not just Hobby Lobby and Mardel, were entitled to an injunction under RFRA. As Judge Gorsuch explained, given that Hobby Lobby and Mardel are controlled exclusively by the Greens, it is undisputed "that Hobby Lobby and Mardel cannot comply with the mandate unless and until the Greens direct them to do so." App. 78a. Judge Gorsuch rejected the government's argument that, under the rules of prudential standing, the Greens were barred as shareholders from asserting claims belonging to the corporation. *Id.* 83a-86a. As he explained, the prudential standing rule "does not bar corporate owners from bringing suit if they have 'a direct, personal interest in a cause of action.' " *Id.* 86a (quoting *Franchise Tax Bd. of Cal.* v. *Alcan*

[10] Subsequently, the district court entered a preliminary injunction. Pet. 15. All lower court proceedings have been stayed by agreement of the parties pending this Court's disposition of the government's petition.

Aluminum Ltd., 493 U.S. 331, 336 (1990)).[11] Here, given that the Greens would be personally required to "direct the corporations to comply with the mandate and do so in defiance of their faith," they have "a quintessentially 'direct' and 'personal' interest protected even under the shareholder standing rule." *Ibid.*[12]

c. In dissent, Chief Judge Briscoe (joined by Judge Lucero) expressed the view that for-profit corporations like Hobby Lobby and Mardel are not "persons" capable of exercising religion under RFRA. App. 118a. Judge Matheson was not convinced that RFRA categorically excluded for-profit corporations, but would have affirmed on the ground that it was a "novel and significant question" which required further development. App. 140a.

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[11] Additionally, Judge Gorsuch suggested that the government waived prudential standing by not raising it below, and also that RFRA's "plain text" excludes prudential standing doctrines. App. 83a-86a; *see* 42 U.S.C. § 2000bb-1(c) (RFRA is "governed by the general rules of standing under Article III").

[12] In a partial concurrence, Judge Matheson agreed that the Greens had standing as the people who "own and manage Hobby Lobby and Mardel," and who are "directly and personally involved in implementing" the [contraceptive-coverage requirement]. App. 162a. Three other judges, however, disagreed. *See* App. 99a-103a (op. of Bacharach, J.); *id.* 135a-136a (op. of Briscoe, C.J., joined by Lucero, J.); *see also id.* 71a n.1 (op. of Hartz, J.) (expressing doubts about the Greens' standing).

REASONS FOR GRANTING THE PETITION

The case for plenary review of the critically important issues presented by the government's petition could hardly be clearer. As the federal government embarks on an unprecedented foray into health care replete with multiple overlapping mandates, few issues are more important than the extent to which the government must recognize and accommodate the religious exercise of those it regulates. And the issues are not just surpassingly important; they also have divided the courts of appeals. Thus, Respondents agree with the government that this Court should grant the petition.

Needless to say, Respondents part company with the government when it comes to the merits of the decision below. While those issues should be fully explored in merits briefing, the decision below is manifestly correct. The corporate and individual Respondents both have standing to press their RFRA claims, and the RFRA question on the merits is not particularly close. The government does not doubt the sincerity of the religious beliefs at issue here and indeed accommodates those beliefs for others. And whatever questions may arise about the substantiality of certain government burdens on religious exercise in other contexts, the crippling fines at issue clearly suffice to trigger RFRA and strict scrutiny. The government cannot remotely satisfy that demanding standard. Its asserted interests are not compelling, the massive exemptions granted to others based on both religious and non-religious grounds defeat any claim to narrow tailoring, and less-restrictive alternatives abound.

This Court should grant plenary review and vindicate the religious exercise rights of Respondents.

A. This case is an excellent vehicle for resolving an exceptionally important question on which the circuits are split.

1. Respondents agree with the government that the Tenth Circuit's en banc decision presents a question of "exceptional importance." Pet. 32. Throughout this litigation, the government has taken the unprecedented position that commercial businesses and their owners—simply because they make profits—cannot exercise religion under the Constitution or federal law. *See, e.g.,* Pet. 20 (asserting that this Court's jurisprudence has "confined" free exercise rights "to individuals and non-profit religious organizations"). The court of appeals properly rejected the government's narrow view, although other courts of appeals have accepted it. When the federal government, bound by both RFRA and the First Amendment to respect religious liberty, takes a miserly view of the scope of religious exercise, the question is undeniably important. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. __, 132 S. Ct. 694 (2012). But such questions assume even larger significance insofar as they arise under the Affordable Care Act, which imposes massive obligations on individuals and corporations alike in the process of attempting to fundamentally re-order the Nation's health care system. *See, e.g., Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, __ U.S. __, 132 S. Ct. 2566, 2609, 2624 (2012) (op. of Ginsburg, J., joined by

Sotomayor, Breyer, and Kagan, JJ.) (observing that "the provision of health care is today a concern of national dimension," but cautioning that "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly * * * interfered with the free exercise of religion").

2. Respondents also agree with the government that the Tenth Circuit's decision "directly conflicts with subsequent decisions by the Third and Sixth Circuits, both of which expressly rejected the court of appeals' reasoning in this case." Pet. 32-33 (citing *Conestoga Wood Specialties Corp.* v. *HHS*, 724 F.3d 377, 384 n.7 (3d Cir. 2013), *petition for cert. filed*, Sept. 19, 2013 (No. 13-356); *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544, at *1 & n.1, *7 (6th Cir. Sept. 17, 2013), *petition for cert. filed*, Oct. 15, 2013 (No. 13-482)). The conflict is square. The Third and Sixth Circuits would categorically exclude Hobby Lobby, Mardel, and the Greens from RFRA's protection. *See, e.g., Conestoga Wood*, 724 F.3d at 381 (concluding that "for-profit, secular corporations cannot engage in religious exercise" and rejecting the owners' free exercise and RFRA claims). By contrast, the Tenth Circuit has ruled that RFRA protects them from being coerced by the contraceptive-coverage requirement to violate their faith or pay ruinous fines.

These issues need to be settled now by this Court. The existing conflict is likely to deepen rapidly, with

the same issues pending in some thirty-five other cases around the country.[13]

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[13] *See* Pet. 35 & n.12 (observing that "comparable RFRA claims are pending in many other courts, including the Seventh, Eighth, Eleventh, and D.C. Circuits") (citing *O'Brien* v. *HHS,* 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012) (argument scheduled for Oct. 24, 2013); *Korte* v. *Sebelius*, 912 F. Supp. 2d 735 (S.D. Ill. 2012), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012) (argued May 22, 2013); *Grote* v. *Sebelius*, 914 F. Supp. 2d 943 (S.D. Ind. 2012), *appeal docketed*, No. 13-1077 (7th Cir. Jan. 9, 2013) (argued May 22, 2013); *Gilardi* v. *Sebelius*, 926 F. Supp. 2d 273 (D.D.C. 2013), *appeal docketed*, No. 13-5069 (D.C. Cir. Mar. 5, 2013) (argued Sept. 24, 2013); *Beckwith Elec. Co.,* v. *HHS*, No. 8:13-cv-0648, 2013 WL 3297498 (M.D. Fla. June 25, 2013), *appeal docketed*, No. 13-13879 (11th Cir. Aug. 28, 2013)); *see also Annex Med., Inc.* v. *Sebelius*, No. 1:12-cv-2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal docketed*, No. 13-1118 (8th Cir. Jan. 14, 2013) (argument scheduled for Oct. 24, 2013).

In addition to those six cases, eight others are currently proceeding through the courts of appeals. *Mersino Mgmt. Co.* v. *Sebelius*, No. 2:13-cv-11296, 2013 WL 3546702 (E.D. Mich. July 11, 2013), *appeal docketed*, No. 13-1944 (6th Cir. July 17, 2013); *Eden Foods, Inc.* v. *Sebelius*, No. 2:13-cv-11229 (E.D. Mich. May 21, 2013), *appeal docketed,* No. 13-1677 (6th Cir. May 22, 2013); *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-207, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013), *appeal docketed*, No. 13-3536 (3d. Cir. Aug. 22, 2013); *Monaghan* v. *Sebelius*, 931 F. Supp. 2d 794 (E.D. Mich. 2013), *appeal docketed*, No. 13-1654 (6th Cir. May 17, 2013); *Triune Health Group* v. *HHS*, No. 1:12-cv-6756 (N.D. Ill. Jan. 3, 2013), *appeal docketed*, No. 13-1478 (7th Cir. Mar. 5, 2013); *Am. Pulverizer Co.* v. *HHS*, No. 6:12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012), *appeal docketed*, No. 13-1395 (8th Cir. Feb. 26, 2013); *Legatus* v. *Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013); *see also Newland* v. *Sebelius*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013) (relying on *Hobby Lobby* to affirm preliminary injunction).

3. This case presents an excellent vehicle for resolving these questions.

a. The Tenth Circuit's en banc decision comprehensively addressed the application of RFRA. It reached not only the threshold issue of whether

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Eighteen additional cases are still in the district courts because the government has either not appealed or has voluntarily dismissed its appeal. *See Tyndale House Publishers, Inc.* v. *Sebelius*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (granting government's motion to dismiss appeal from grant of preliminary injunction); *see also Midwest Fastener Corp.* v. *Sebelius*, No. 1:13-cv-1337 (D.D.C. Oct. 16, 2013); *Barron Indus.* v. *Sebelius*, No. 1:13-cv-1330 (D.D.C. Sept. 25, 2013); *Armstrong* v. *Sebelius*, No. 1:13-cv-563, 2013 WL 5213640 (D. Colo. Sept. 17, 2013); *Briscoe* v. *Sebelius*, No. 1:13-cv-285, 2013 WL 4781711 (D. Colo. Sept. 6, 2013); *QC Group* v. *Sebelius*, No. 0:13-cv-1726 (D. Minn. Aug. 30, 2013); *Willis & Willis, P.L.C.* v. *Sebelius*, No. 1:13-cv-1124 (D.D.C. Aug. 23, 2013); *Trijicon, Inc.* v. *Sebelius*, No. 1:13-cv-1207 (D.D.C. Aug. 14, 2013); *Ozinga* v. *HHS*, No. 1:13-cv-3292 (N.D. Ill. July 16, 2013); *SMA, L.L.C.* v. *Sebelius*, No. 0:13-cv-1375 (D. Minn. July 8, 2013); *Sharpe Holdings, Inc.* v. *HHS*, No. 2:12-cv-92 (E.D. Mo. June 28, 2013); *Johnson Welded Prods.* v. *Sebelius*, No. 1:13-cv-609 (D.D.C. May 24, 2013); *Hartenbower* v. *HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013); *Hall* v. *Sebelius*, No. 0:13-cv-295 (D. Minn. Apr. 2, 2013); *Bick Holdings, Inc.* v. *Sebelius*, No. 2:13-cv-462 (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Constr.* v. *Sebelius*, No. 1:12-cv-325 (N.D. Ind. Apr. 1, 2013); *Lindsay* v. *HHS*, No. 1:13-cv-1210 (N.D. Ill. Mar. 20, 2013); *Sioux Chief Mfg. Co.* v. *Sebelius*, No. 4:13-cv-36 (W.D. Mo. Feb. 28, 2013).

Finally, three additional cases remain in district court either because the plaintiffs have not yet appealed an adverse decision or the district court has not yet ruled. *See M.K. Chambers* v. *HHS*, No. 2:13-cv-11379, 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013); *Infrastructure Alternatives, Inc.* v. *Sebelius*, No. 1:13-cv-31 (W.D. Mich. Sept. 30, 2013); *Holland* v. *HHS*, No. 2:13-cv-15487 (S.D. W.Va. filed June 24, 2013).

for-profit corporations may sue under RFRA, *see* App. 23a-43a, but the merits as well. *See id.* 44a-56a (substantial burden); *id.* 56a-61a (strict scrutiny).[14] By contrast, the Third and Sixth Circuits addressed only the threshold issue. *See* Pet. 33-34 (noting *Conestoga Wood* and *Autocam* held that "a for-profit corporation and its controlling shareholders" have no RFRA claims). Since the government's petition encompasses all RFRA issues, and this Court should be in a position to address all three issues, this case is a better vehicle for addressing the basic, recurring and fundamentally important questions about the government's ability to force for-profit businesses and their owners to sacrifice their religious beliefs. *See* Pet. i (asking "whether RFRA allows a for-profit corporation" an exemption "based on the religious objections of the corporation's owners").

b. Factually, this case is an ideal vehicle for addressing whether a for-profit business and its owners can exercise religion. "Hobby Lobby and Mardel * * * are closely held family businesses with an explicit Christian mission as defined in their governing principles." App. 42a. One of the co-plaintiffs, Mardel, is a "Christian bookstore chain" App. 4a. And, in adherence to their companies' religious mission, the Greens "have made business decisions according to * * * [religious] standards," App. 42a—including closing stores on Sunday, taking out evangelical ads in newspapers, providing cost-

[14] Four judges also concluded that the Greens have Article III and prudential standing to bring RFRA claims. *See* App. 82a-87a (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); *id.* 152a-162a (op. of Matheson, J.).

free spiritual counseling for employees, and avoiding business practices contrary to their beliefs. App. 7a-9a.

Moreover, "the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel." App. 42a. Since the Greens alone control Hobby Lobby's self-insured plan, App. 14a, a favorable decision from this Court will unambiguously allow them to continue offering a plan conforming to their religious convictions, without needing to secure the cooperation of a third-party insurer. *Cf.* Petition for Writ of Certiorari at 8, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356 (U.S. filed Sept. 19, 2013) ("Lacking injunctive relief, Conestoga's health issuer inserted coverage of the contraceptives into their plan over Petitioners' objection, because the issuer sought to avoid penalties on itself.").[15]

Finally, the magnitude of the potential fines at issue makes resolution of the substantial burden question straightforward. *See* App. 51a (given potential fines of $1.3 million per day, "it is difficult

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[15] The petitioners in *Autocam Corp.* v. *Sebelius* suggest there is a dispute in this case about how the objectionable drugs operate. Petition for Writ of Certiorari at 37, *Autocam Corp.* v. *Sebelius*, No. 13-482 (U.S. filed Oct. 15, 2013). They are mistaken. The government concedes in its petition, as it has throughout this litigation, that the drugs to which Respondents object can prevent an embryo's "implantation" in the womb. *See* Pet. 10 n.5. Based on that concession, the en banc court found "no material dispute" on the issue and, thus, that the court "need not wade into scientific waters here." App. 10a n.3.

to characterize the pressure as anything but substantial"). Below, "the government did not question the significance of the financial burden" on Respondents. *Id.* 52a. With no "subsidiary factual issues" needing resolution, the Court can decide the substantial burden issue "as a matter of law." App. 52a.

c. This Court's review is urgently needed. As Petitioners point out, "[a]lthough the decision addressed a preliminary injunction, the court definitively decided the legal questions at the heart of the case, making it unnecessary to await further proceedings before granting review." Pet. 32; *see also, e.g., Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 466 (2009); *O Centro,* 546 U.S. at 423 (reviewing preliminary injunctions). [16] Challenges to the contraceptive-coverage requirement are proliferating. *See supra* note 13. And the extent of religious freedom is simply too important to be clouded with uncertainty and left to vary among the Circuits.

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[16] The government took the same position on remand to the district court in this case, where it declined to introduce additional evidence and agreed that "there are no factual disputes" precluding the district court from entering a preliminary injunction. Prelim. Inj. Hr'g Tr. at 6 (July 19, 2013). Moreover, when the district court asked counsel for the government whether this case was expected to require a trial, counsel stated she thought the case "would likely involve mostly questions of law," and that "at this point [we] do not intend to seek" any "discovery period." *Id.* at 7.

B. The Tenth Circuit correctly decided that the contraceptive-coverage requirement violates RFRA.

1. While the parties agree on the importance of the issues, the intractable nature of the division among the Circuits, and the need for this Court's plenary review, they obviously disagree on the merits. There will be time enough to explore the merits if this Court grants plenary review. That said, Respondents respectfully submit that the court of appeals correctly decided that Hobby Lobby and Mardel may assert religious exercise claims under RFRA. App. 24a-43a.

a. The ability of the corporate Respondents to assert rights under RFRA should not be open to serious debate. RFRA's plain text protects "a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The Dictionary Act provides that, "[i]n 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 (emphasis added). The court of appeals correctly noted that "we could end the matter here since the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a.

Furthermore, nothing in RFRA's "context" suggests it silently excludes some corporations, while including others. *See* App. 26a ("context" under the Dictionary Act "means the text of the Act of Congress

surrounding the word at issue, or the text of other related congressional Acts") (quoting *Rowland* v. *Cal. Men's Colony*, 506 U.S. 194, 199 (1993)). The text makes no distinction between non-profit and for-profit corporations. Nor is there any indication that RFRA adopted the limited exemptions from statutes like Title VII and the ADA, thereby incorporating "[a] distinction between non-profit, religious organizations and for-profit secular companies." App. 27a. The Title VII and ADA exemptions are worded to exempt only "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (Title VII); *id.* § 12113(d)(1), (2) (ADA). RFRA does not use that language. Instead, RFRA protects any "person's" religious exercise, and broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4); *id.* § 2000cc-5(7)(A). The Title VII and ADA exemption language was available to Congress as a model when it composed RFRA, but Congress did not adopt it. The notion that Congress nonetheless incorporated those unusual limitations when it used language including all persons broadly defined strains credulity.

b. Nothing in the jurisprudence preceding RFRA suggests Congress meant to exclude for-profit corporations. App. 34a-43a.

Congress enacted RFRA against the backdrop of over a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. As this Court said in *Monell* v. *Department of Social Services*, "by 1871, it was well understood that

corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." 436 U.S. 658, 687 (1978). Thus, corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause and section 1983,[17] and recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.[18]

This Court has rejected the government's approach to limiting rights based on their corporate origin. In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978), 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." *See also Citizens United* v. *FEC*, 558 U.S. 310, 342-43 (2010) (explaining that "political speech does not lose

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[17] *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).

[18] *See, e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Utils. Comm'n*, 447 U.S. 557, 566-68 (1980) (commercial speech); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) (unreasonable search); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) (double jeopardy); *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) (takings); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 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 Group, Inc.*, 532 U.S. 424, 433-34 (2001) (protection from excessive fines).

First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti*, 435 U.S. at 784). Just as it is wrong to ask whether "corporations have speech rights," it is also wrong to ask whether "corporations exercise religion." The right question, per *Bellotti*, is whether the law abridges religious activity that RFRA and the First Amendment protect. Here the answer is plainly yes.

To be sure, this Court has noted a category of "purely personal" rights only natural persons may exercise. *See Bellotti*, 435 U.S. at 778 n.14 (suggesting that "purely personal guarantees," like the privilege against compulsory self-incrimination, are "unavailable to corporations and other organizations"). But "[i]t is beyond question that associations—not just individuals—have Free Exercise rights." App. 34a (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984)). And, "[a]s should be obvious," the right of religious exercise extends to all manner of religious associations—"including those that incorporate." App. 35a (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993); *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.)).

Moreover, this Court has long held that "*individuals* have Free Exercise rights with respect to their *for-profit businesses*." App. 35a-36a (citing *Lee*, 455 U.S. 252); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961)) (emphasis in original); *see also* App. 68a (Hartz, J., concurring) (noting that "the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion"). It makes no sense to say 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." App. 38a. This Court has expressly rejected the notion that the profit motive negates the exercise of constitutional rights. *See, e.g., New York Times Co.* 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").

In light of all this, it is impossible to read RFRA to contain a secret background principle that, "when individuals incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. Below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a (Hartz, J., concurring). Nor is there any principled reason to believe that individuals forming corporations can exercise religion unless and until they earn profits. Such a position "is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." App. 36a.

2. Alternatively, the Greens themselves have an independently valid claim under RFRA. As four judges below correctly found, Hobby Lobby and Mardel cannot comply with the contraceptive-coverage requirement unless the Greens, "as the controlling owners and operators," personally "direct the corporations to [do so]." App. 86a. It is undisputed that the Greens would be acting "in defiance of their faith" if they comply, and that their

businesses would suffer crippling fines if they do not comply. *Ibid.* Thus, whether the Greens raise their claims independently or through their family businesses, there is not even a "colorable question that the Greens face a 'substantial burden' on their 'exercise of religion.' " *Id.* 87a; *see, e.g., Stormans, Inc.* v. *Selecky,* 586 F.3d 1109, 1120-21 (9th Cir. 2009) (relying on *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988)) (holding that "a corporation has standing to assert the free exercise right of its owners").

The government's only argument in response is that the Greens' claims are barred by the prudential "shareholder standing" rule, which bars shareholder claims that are purely derivative of a corporation's claims. *See, e.g., Alcan*, 493 U.S. at 336; App. 157a-159a. This argument is doubly flawed.

First, as Judges Gorsuch, Kelly, Tymkovich, and Matheson explained, the shareholder standing argument is meritless, because it is "well-established * * * that 'a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated.' " *Id.* 159a (quoting *Alcan*, 493 U.S. at 336); *see also id.* 86a. Here, because the mandate "requires [the Greens] * * * directly and personally to take *affirmative action* contrary to their religious beliefs," "their core alleged injury is religious," and not derivative of their companies' injuries. *Id.* 161a (emphasis in original).

Second, a prudential standing argument is just that, prudential. Congress is free to override any

non-Article III limitation on standing and Congress clearly did that in RFRA. *See, e.g., Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982) (where "Congress intended standing * * * to extend to the full limits of Art[icle] III," courts "lack the authority to create prudential barriers to standing") (internal quotation marks omitted); 42 U.S.C. § 2000bb-1(c) (providing that "[s]tanding to assert a claim or defense under [RFRA] shall be governed by the general rules of standing under article III of the Constitution"). RFRA affirmatively protects the religious exercise rights of persons broadly defined. There is absolutely no basis in RFRA for the government's divide-and-conquer strategy where corporations have standing but no rights, and individuals who direct and control closely-held corporations have rights but no standing. Such a doctrine would defeat Congress' evident demand that the federal government respect the religious exercise rights of those it regulates.[19]

Because the Greens "assert rights * * * independent of their shareholder status," App. 162a, they have standing to assert their individual RFRA claims against the contraceptive-coverage requirement.

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[19] The weakness of the government's prudential standing argument is underscored by the fact that it did not even raise the argument until prompted by the en banc court. *See* App. 83a (op. of Gorsuch, Kelly, and Tymkovich, JJ.) (explaining that prudential standing was forfeited, because the government "did not raise [it] as a defense in the district court" or in its principal appellate brief, but only "took up that cudgel when [the en banc court] *asked* for supplemental briefing on the issue").

3. On the merits, the court of appeals correctly concluded that the contraceptive-coverage requirement substantially burdens Respondents' religious exercise. Indeed, the government essentially recognizes as much by exempting certain religious organizations from this very requirement. Moreover, as the Tenth Circuit recognized, the substantial nature of the burden is made clear by "the *intensity of the coercion* applied by the government to act contrary to [Respondents' religious] beliefs." App. 44a (emphasis in original). This understanding of substantial burden "rests firmly" on this Court's free exercise cases. *See id.* 46a-50a (relying on *Thomas*, 450 U.S. at 717-18; *Lee*, 455 U.S. at 256-57). It focuses "on the coercion" imposed by the government on the claimant "to violate his beliefs." App. 48a (citing *Lee*, 455 U.S. at 256-57).

The court of appeals properly applied that standard to find Hobby Lobby and Mardel's religious exercise substantially burdened by the contraceptive-coverage requirement. First, the court accurately identified the religious exercise at issue as Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting'" the mandated contraceptives. App. 50a-51a. Second, the court found the sincerity of Respondents' beliefs was undisputed. App. 51a. Finally, the court found it "difficult to characterize the pressure as anything but substantial," given the stark choices facing Hobby Lobby and Mardel—namely, either to "compromise their religious beliefs," pay nearly "$475 million more" in annual taxes, or drop employee health

benefits and "pay roughly $26 million more in annual taxes." App. 51a-52a. Given that the government "did not question the significance of [this] financial burden" below, the court correctly concluded that "Hobby Lobby and Mardel have established a substantial burden as a matter of law." App. 52a.[20]

The court properly rejected the government's substantial burden arguments. *See* App. 44a, 52a-56a. For instance, the government contended that any burden was not "substantial" because 1) use of the drugs depended on "[a]n employee's decision" that "cannot properly be attributed to her employer," and 2) insurance is "just another form of non-wage compensation * * * supposedly the equivalent of money." App. 44a, 52a-53a. Both arguments failed for the same reason: they asked the court to second-guess the theology of Respondents' religious exercise. As the Tenth Circuit properly found, Respondents "have drawn a line at providing coverage for drugs and devices they consider to induce abortions" and it was not the court's "prerogative to determine whether [that] line * * * 'was an unreasonable one.' " App. 53a (quoting *Thomas*, 450 U.S. at 715). Doing so would improperly require "an inquiry into the theological merit of the belief in question." App. 44a. Further, as the court explained, it was not the "employees' health care decisions" that burdened the companies' religious exercise, but rather "the

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[20] Alternatively, the court could have resolved the question as Judge Hartz did. *See* App. 76a (op. of Hartz, J.) (reasoning that Hobby Lobby and Mardel are substantially burdened simply because the regulation "compels [them] to act contrary to their religious beliefs").

government's demand that Hobby Lobby and Mardel enable access to contraceptives that [they] deem morally problematic." App. 53a.

4. Finally, the court of appeals correctly concluded that the government did not carry its burden of proving that the contraceptive-coverage requirement meets strict scrutiny. *See O Centro*, 546 U.S. at 429 (explaining that "the burden [of strict scrutiny] is placed squarely on the [g]overnment by RFRA * * * including at the preliminary injunction stage") (citing 42 U.S.C. § 2000bb-1(b), 2000bb-2(3)).

a. The government did not demonstrate that applying the requirement to Respondents furthers any compelling interest. Below, the government articulated only "broadly formulated interests" in public health and gender equality, but "offer[ed] almost no justification for not 'granting specific exemptions to particular religious claimants.'" App. 57a-58a (quoting *O Centro*, 546 U.S. at 431); *see also* Pet. 27-28 (reiterating interests in "promotion of public health" and "assuring [women's] equal access to health-care services"). That lack of specificity dooms a compelling interest claim under RFRA. *See, e.g., O Centro*, 546 U.S. at 430-31 (RFRA requires government to "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") (quoting 42 U.S.C. § 2000bb-1(b)) (emphasis added). The government failed to show with any "particularity" how its interests would be "adversely affected" by granting a limited four-drug exemption to Hobby Lobby and

Mardel. App. 57a (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 236 (1972)).

That failure is particularly glaring here. For instance, the government has offered religious exemptions and "religion-related accommodations" to thousands of non-profit employers, Pet. 8, which, in the government's own words, are necessary to "protect[ ]" objecting organizations from "having to contract, arrange, pay, or refer for [contraceptive] coverage," 78 Fed. Reg. 39870, 39872 (July 2, 2013). But the government failed to explain why Hobby Lobby and Mardel do not deserve the same "protection"—beyond the bald statement that they are "for-profit organizations." Pet. 9.

Worse still, the government exempts countless employers without any religious scruples based on nothing more than its interests in administrative convenience and appropriate "transition" rules. As the court of appeals properly concluded, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." App. 58a. Numerous employers are not required to offer employees any contraceptive coverage, such as employers with "grandfathered" plans,[21] employers with fewer than fifty employees (who are not required to offer health insurance at all), and employers eligible for religious exemptions. *Id.* Given these enormous gaps, the government cannot

[21] The government insists that grandfathering is "transitional," Pet. 30, but, as the court of appeals pointed out, plans may remain grandfathered "indefinitely," App. 13a.

plausibly maintain its interests are compelling. *See, e.g., Lukumi*, 508 U.S. at 547 (explaining that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

Finally, in its petition the government proposes a new interest in "ensuring a 'comprehensive insurance system with a variety of benefits available to all participants.'" Pet. 29 (quoting *Lee*, 455 U.S. at 258). But that interest—raised for the first time in this Court—cannot be compelling here. Unlike the social security system at issue in *Lee*, in which "mandatory participation [was] indispensable to [the system's] fiscal vitality" and to its ability to function (*see, e.g., O Centro*, 546 U.S. at 435), the contraceptive-coverage requirement cannot possibly demand "mandatory participation" because it expressly contemplates a system of widespread exemptions. *See, e.g.*, 45 C.F.R. § 147.131(a) (providing for exemptions for "religious employer[s] * * * with respect to any requirement to cover contraceptive services"). And, as already discussed, the requirement is honeycombed with religious and secular exemptions for thousands of employers and tens of millions of employees.

b. Even assuming a compelling interest, the contraceptive-coverage requirement still fails strict scrutiny because the government did not prove it is the least restrictive means of furthering its interests.

Below, the government offered no evidence explaining why it could not increase contraceptive

access and use by other readily available means. *See, e.g., Korte* v. *Sebelius*, No. 12-3841, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2013) (noting "the government has not advanced an argument that the contraception mandate is the least restrictive means of furthering" its "generalized interest[s]"). For instance, the government spends hundreds of millions a year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services." 42 C.F.R. § 59.5(a)(1).[22] The government did not explain why it could not use a pre-existing program like this to redress genuine economic barriers to contraceptive access. *See, e.g.*, 42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family"); *see also, e.g., Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting such "analogous programs" and lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). Such alternative means would be far less restrictive of employers' religious freedom than the contraceptive-coverage requirement, which directly conscripts employer health plans. That intrusive approach is particularly unjustified for employers like Hobby Lobby and

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[22] *See also, e.g.,* RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

Mardel, who already provide employees with generous wages and benefits and who "ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether." App. 60a. As the court of appeals observed, "[t]he government does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 21, 2013