Nos. 13-354/13-356

IN THE

Supreme Court of the United States

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

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

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

v.

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

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

Brief of Religious Organizations as *Amici Curiae* Supporting the Government

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INTERESTS OF *AMICI CURIAE*

Amici are religious organizations representing a variety of faith traditions.[1]

The **Anti-Defamation League** (ADL) was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and safeguarding individual religious liberty. A staunch supporter of the religious rights and liberties guaranteed by both the Establishment and Free Exercise clauses, ADL vigorously supported the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, as a means to protect individual religious exercise, but not as a vehicle to enable some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to advocate for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

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[1] Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by the government and Conestoga. Counsel for Hobby Lobby has also consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

Catholics for Choice (CFC) represents the majority of Catholics on issues of sexual and reproductive rights and health, and is the leading voice in debates at the intersection of faith, women's health, reproductive choice and religious liberty. Founded in 1973, CFC seeks to shape and advance sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the capacity of women and men to make moral decisions about their lives. CFC's work promotes respect for the moral autonomy of every person, based on the foundational Catholic teaching that every individual must follow his or her own conscience and respect others' right to do the same.

CORPUS is a faith community affirming an inclusive priesthood rooted in a reformed and renewed Church. It provides not only a ministry of service open to the diverse ways that people are authentically called by God, but also seeks sacramental ecumenical collaboration. The community and ministry are defined not only in traditional and canonical categories, but also in terms of the needs requiring autonomy and pastoral service.

DignityUSA was founded in 1969 and is an organization of lesbian, gay, bisexual, and transgender (LGBT) Catholics and supporters. Among the areas of concern outlined in its Statement of Position and Purpose is the promotion of "equal access and justice in all areas of health care and healing." DignityUSA is concerned that LGBT people could be denied equal access to health care services if employers are allowed to restrict health coverage on the basis of the religious belief of the owners.

Disciples for Choice is a pro-choice organization within the Christian Church (Disciples of Christ). Disciples for Choice believes that a woman should have full control over her own body and decisions related to reproduction, and that restrictions on these rights violate the religious liberty and God-given agency of women. Disciples for Choice stands alongside people of faith and conscience who work to defend and preserve these rights.

Disciples Justice Action Network is a network of individuals, congregations, and organizations within the Christian Church (Disciples of Christ), all working together to promote greater justice, peace, freedom, and inclusion in both church and society. Its mission is to promote a passion for justice in our churches, provide prophetic Disciples leadership to ecumenical and interfaith coalitions, and work together with all people of goodwill to build the Beloved Community envisioned by Dr. Martin Luther King, Jr.

The **Global Justice Institute** was founded by Metropolitan Community Churches in 2006 and is an independent 501(c)(3) organization dedicated to supporting the work of LGBT and human-rights activists around the globe. Together with The Fellowship of Affirming Ministries, the Institute offers support for programs fostering theological reconciliation, economic development, and the creation of positive media.

Hadassah, The Women's Zionist Organization of America, Inc. was founded in 1912, and has over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other ini-

tiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States and supporting the free exercise of religion.

The Hindu American Foundation is an advocacy group providing a Hindu American voice. The Foundation addresses global and domestic issues concerning Hindus, such as religious liberty, hate crimes, and human rights.

The Interfaith Alliance Foundation is a 501(c)(3) organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has members across the country belonging to 75 different faith traditions as well as to no faith tradition.

Jewish Women International (JWI) has 50,000 members and supporters across the country and is the leading Jewish organization working to prevent the cycle of violence and empower women and girls to realize their full potential. JWI has been an unwavering Jewish voice for comprehensive reproductive health services, and continues to advocate for access to reproductive health information and services, which build a foundation for healthier families and communities. JWI believes that women should be able to make private health decisions according to the dictates of their own faith and conscience.

The **Methodist Federation for Social Action** (MFSA) was founded in 1907 and is dedicated to mobilizing the moral power of the faith community for social justice through education, organizing, and advocacy. MFSA believes that every child should be a

wanted child and that access to affordable family planning should be readily available to all people and not restricted by the government or employers.

Metropolitan Community Church (MCC) was founded in 1968 to combat the rejection of and discrimination against persons within religious life based upon their sexual orientation or gender identity. MCC has been at the vanguard of civil and human rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is a movement that faithfully proclaims God's inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.

The **National Coalition of American Nuns** (NCAN) began in 1969 to study and speak out on issues of justice in church and society. Among other things, NCAN calls on the Vatican to recognize and work for women's equality in civil and ecclesial matters, to support gay and lesbian rights, and to promote the right of every woman to exercise her primacy of conscience in matters of reproductive justice.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay." NCJW's principles provide that "religious liberty and the separation of religion and state are

constitutional principles that must be protected and preserved in order to maintain our democratic society."

New Ways Ministry represents Catholic lay people, priests, and nuns who work to ensure that the human dignity, freedom of conscience, and civil rights of LGBT people are protected in all circumstances, including in making decisions about healthcare. New Ways Ministry is a national Catholic ministry of justice and reconciliation for people and the wider Catholic Church. Through education and advocacy, New Ways Ministry promotes the full equality of LGBT people in church and society. New Ways Ministry's network includes Catholic parishes and college campuses throughout the United States.

The **Reconstructionist Rabbinical College** (RRC) is a progressive rabbinical school where people of all backgrounds engage intensively with Jewish texts, thought and practice. In 2012, the RRC also became the center of the **Jewish Reconstructionist Communities**, which are rooted in Jewish tradition and committed to egalitarianism and inclusion. There are over 100 Reconstructionist Communities in the United States committed to Jewish learning, ethics, and social justice. The RRC and the Jewish Reconstructionist Communities believe both in the importance of the separation of church and state and that the reproductive rights of women must be preserved and protected.

The **Religious Coalition for Reproductive Choice** (RCRC) was founded in 1973 and is dedicated to mobilizing faith support for reproductive health, rights and justice. With organizational members from the Catholic, Protestant, Jewish, and Uni-

tarian Universalist traditions, RCRC seeks to change culture and policy in accordance with its shared religious commitment to compassion, equality, respect, and justice. RCRC's members hold varying views on theology and contemporary life, including human reproduction, yet agree that all people deserve access to the full range of reproductive health services, unencumbered by religious doctrines or government coercion. RCRC affirms birth control as morally good for individuals, families, and society.

The Religious Institute is a multifaith organization advocating for sexuality education, reproductive justice, and the full inclusion of women and LGBT people in faith communities and society.

The **Society for Humanistic Judaism** (SHJ) is the congregational arm of Humanistic Judaism. The SHJ mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews. SHJ members seek to ensure that they, as well as people of all faiths and viewpoints, will continue to have the ability to make their own decisions about health care, including contraceptive care, based on their personal religious beliefs.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.3 million Reform Jews; the **Central Conference of American Rabbis**, whose membership includes more than 2000 Reform rabbis; and the **Women of Reform Judaism** that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue as long-

time supporters of religious liberty. The United States' commitment to principles of religious liberty has allowed religious freedom to thrive throughout its history. At the same time, these organizations strongly support women's ability to make their own reproductive health decisions. They are inspired by Jewish tradition, which teaches that health care is the most important communal service, and therefore should be available to all.

The **Unitarian Universalist Association** (UUA) comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state, and believes that the federal contraceptive rule does not substantially burden religious exercise under the Religious Freedom Restoration Act.

The **Unitarian Universalist Women's Federation** has had an abiding interest in the protection of reproductive rights and access to reproductive health services since its formation nearly 50 years ago. It has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights.

The **Women's Alliance for Theology, Ethics and Ritual** (WATER) is a non-profit educational organization made up of justice-seeking people, from a variety of faith perspectives and backgrounds, who promote the use of feminist religious values to make social change. WATER believes that women's health decisions are private, and that the community's responsibility is to make health care available for everyone. WATER participates in this amicus brief because a just society both respects privacy and promotes health.

Women's Ordination Conference (WOC), founded in 1975, is the world's oldest and largest national organization working for the ordination of women as priests, deacons, and bishops into an inclusive and accountable Catholic Church. WOC supports the notion that all Catholics should participate in making the decisions that affect their personal lives. To this end, WOC works to renew church governance to be inclusive, accountable and transparent, bring about justice and equality for Catholic women in all aspects of their lives, and incorporate women-centered theologies into everyday Catholicism.

INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs are secular, for-profit corporations (and the individual owners of these corporations) that sell goods—including arts-and-crafts supplies, books, and wooden parts for kitchen cabinets—for financial profit. As part of their employment compensation, employees of the Plaintiff corporations receive health insurance coverage through self-funded group health plans. *See* Hobby Lobby Resp. to Pet. 3; Conestoga C.A. App. 48.

These group health plans currently exclude coverage for certain contraceptives, including emergency contraception and the IUD, that Plaintiffs' owners believe act as "abortifacients" because they may inhibit the implantation of an embryo into the uterus. Conestoga Br. 4; *but see* Julie Rovner, *Morning-After Pills Don't Cause Abortion, Studies Say*, All Things Considered (Feb. 21, 2013), http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say (all websites last visited Jan. 28, 2014). Plaintiffs argue that

the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, exempts them from the requirement that employers who choose to provide health insurance include coverage for contraception.

Amici are faith-based organizations representing a variety of religious traditions. They support a robust interpretation of RFRA that safeguards the deeply personal right to the free exercise of religion. But *amici* also believe that if accepted, Plaintiffs' arguments would undermine—not promote—religious liberty, by allowing employers to impose their owners' religious beliefs on employees, many of whom will hold different moral and religious views on the use of contraception. This result would be especially unwelcome as the United States and its workforce become more religiously diverse.

Nor is there any good reason to allow this result: application of the contraception regulations to Plaintiffs would not substantially burden religious exercise. First, Plaintiffs are under no obligation to provide their employees with health insurance. If they object to certain types of coverage that must be included in employee health policies, they may stop offering insurance and pay a modest tax to the government instead; this tax is likely to be much cheaper than the cost of buying health insurance. Plaintiffs could pass along the savings to their employees in the form of higher salary, and Plaintiffs' employees would be eligible to obtain health insurance—including coverage for contraception—on the public exchanges, often with government subsidies. What Plaintiffs may not do is hold their employees hostage: refusing to include coverage for contraception, but also blocking their employees from obtaining comprehensive, subsidized insurance elsewhere.

Second, even if Plaintiffs wish to continue offering insurance to their employees as part of their compensation, the contraception regulations do not substantially burden religious exercise. For several reasons, any connection between Plaintiffs and contraception is incidental and attenuated—and thus fails to produce a burden that is "substantial" as a matter of law. The contraception regulations fall on secular, for-profit corporations, which are legally and practically distinct from the individual owners who hold religious beliefs about contraception. Contraception coverage is just one of many types of medical coverage that must be included in a comprehensive group health plan. And contraception is used only after the independent decision of the employee, often in consultation with her physician. This analysis requires no second-guessing of Plaintiffs' religious views or moral calculus; rather, it requires a judgment about the types of burdens that RFRA recognizes as a matter of law.

Plaintiffs have no legal interest in restricting the manner in which their employees choose to use their compensation, including their health benefits. Many of Plaintiffs' employees do not share their employers' owners' religious beliefs about contraception, and should retain the freedom to make their own healthcare decisions, consistent with "their culture, faith tradition, religious beliefs, conscience, and community." Open Letter on Family Planning from The Religious Institute to Religious Leaders 2 (Feb. 25, 2013) ("Religious Institute, *Letter on Family Planning*"), *available at* http://www.religious institute.org/wp-content/uploads/2012/09/Open-Letter-on-Family-Planning-with-endorsers.pdf.

ARGUMENT

I. RFRA Should Be Interpreted To Preserve The Religious Liberty Of Both Employers And Employees.

A. The United States and its workforce are becoming more religiously diverse.

RFRA should be interpreted in a manner that respects religious diversity, including the religious diversity of the nation's workforce. The United States is a pluralistic society with an "increasingly diverse religious landscape." Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey* 2 (2008) ("*Religious Landscape Survey*"), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. Less than half (48%) of Americans identify as Protestant, and less than a quarter (22%) identify as Catholic; six percent identify as Jewish, Buddhist, Muslim, or another faith, and nearly one in five (19.6%) do not affiliate with any religion. Pew Forum on Religion & Public Life, *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* 13 (2012), *available at* http://www.pewforum.org/files/2012/10/Noneson theRise-full.pdf.

This diversity exists not only across religious traditions, but within them. The Protestant population, for example, "is characterized by significant internal diversity and fragmentation, encompassing hundreds of different denominations"; minority religions, such as Judaism and Buddhism, also "reflect considerable internal diversity." *Religious Landscape Survey*, *supra*, at 5, 6. Moreover, the religious affiliations of American adults are "extremely fluid," with twenty-eight percent "hav[ing] left the faith in which they

were raised in favor of another religion—or no religion at all." *Id.* at 5.

In addition, "[r]eligious diversity is a fact of the American workplace." Tanenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion* 6 (2013), *available at* http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf. Approximately half of American workers "ha[ve] contact with people from diverse beliefs and identities at work—often with considerable frequency." *Id.* As the country becomes more religiously diverse, workplaces will become more diverse as well.

This diversity of religious belief extends to views about contraception. No single religious leader or group can speak for all faith traditions on this issue. Indeed, "[m]illions of people ground their moral commitment to family planning in their religious beliefs. Most faith traditions accept modern methods of contraception, and support it as a means of saving lives, improving reproductive and public health, enhancing sexuality, and encouraging intentional parenthood." Religious Institute, *Letter on Family Planning*, *supra*, at 1. Other religions take the position that contraception is a decision for individuals to make according to their own consciences.[2]

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[2] *See, e.g.*, *Sikhism and Birth Control*, BBC Ethics Guide, Contraception (2009), http://www.bbc.co.uk/religion/religions/sikhism/sikhethics/contraception.shtml (according to Sikh religion, use and form of contraception "is a matter for the couple concerned"); Amirrtha Srikanthan & Robert L. Reid, *Religious and Cultural Influences on Contraception*, 30 J. Obstetrics &

Not only do different religious leaders have different views about contraception, but attitudes about contraception vary even within individual religious denominations. "Within every major religion there are sects or traditions with diametrically opposed views on each of the major areas of bioethics," including contraception. Dominic J. Campisi et al., *Heirs in the Freezer: Bronze Age Biology Confronts Biotechnology*, 36 ACTEC J. 179, 202–03 (2010).

- Among Catholic women who have had sex, 98% have used a contraceptive method prohibited by the Vatican.[3]
- The leadership of most mainline Protestant denominations believes that decisions about contraception are properly committed to the consciences of the individual woman and her partner, though other denominations oppose the use of contraception.[4]
- Most Reform and Conservative Jews fully embrace contraception, and even Orthodox Judaism

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Gynaecology Can. 129, 133 (2008) ("Hinduism regards the decision to use contraception as a personal matter for women that is not usually within the scope of religious injunction.").

[3] *See* Rachel K. Jones & Joerg Dreweke, Guttmacher Institute, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use* 4 (2011), *available at* www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf.

[4] *See* Joseph G. Schenker, *Assisted Reproductive Practice: Religious Perspectives*, 10 Reprod. BioMedicine Online 310, 310 (2005); *see also* Srikanthan & Reid, *supra*, at 131 (although biblical literalism "has resulted in disapproval of contraception among conservative Protestants," "[v]irtually all liberal Christian communities accept the use of contraception within marriage for the purpose of exercising responsible parenthood, enhancing marital love, and protecting women's health").

permits the use of oral contraception in some circumstances.[5]

Nationwide, contraception is viewed as morally acceptable by 89% of adults. Gallup News Service, *Gallup Poll Social Series: Values and Beliefs* 10 (2012), *available at* http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx (click on link at bottom of page).

Many employees, then, will have different religious beliefs about contraception than their employers' owners. If Plaintiffs' arguments were to prevail, however, employees would find it more difficult to make personal decisions about healthcare and contraception in accordance with their own consciences. Those effects would be especially pervasive because most Americans receive their health insurance as part of their employment compensation. *See* Hubert Janicki, U.S. Census Bureau, *Employment-Based Health Insurance: 2010* 1 (2013), *available at* http://www.census.gov/prod/2013pubs/p70-134.pdf.

As the country becomes more diverse, a regime that allows a corporation's owner to limit the healthcare options of employees will inevitably lead to the withholding of coverage for healthcare other than contraception. Some companies might wish to exclude coverage for blood transfusions. *See, e.g.*, *Robidoux v. O'Brien*, 643 F.3d 334, 341 (1st Cir. 2011) ("Jehovah's Witnesses may oppose blood trans-

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[5] Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 Annals Health L. 37, 44–45 (2006); William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. Contemp. Health L. & Pol'y 455, 510 (2001).

fusions even where doctors say this is essential."). Others might refuse to include coverage for psychiatric care. *See, e.g.*, Emily Berntsen, Note, *The Child Medication Safety Act: Special Treatment for the Parents of Children with ADHD?*, 83 Wash. U. L.Q. 1567, 1583 (2005) ("[T]he Church of Scientology holds a disbelief in psychiatry and in treating mental disorders with pharmaceuticals."). Others might deny coverage for routine medical care associated with stem-cell trials for disorders such as Parkinson's Disease. *See, e.g.*, Southern Baptist Convention, *Resolution on Human Embryonic and Stem Cell Research* (1999), http://www.sbc.net/resolutions/amResolution.asp?ID=620. Yet others might withhold coverage for medically necessary hysterectomies, or vaccinations against chicken pox, Hepatitis A, and Rubella. *See, e.g.*, Mathew D. Staver, Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom*, *available at* http://www.lc.org/media/9980/attachments/memo_vaccination.pdf. Still others might refuse to provide coverage for prescription drugs or surgical procedures using medical devices that contain pig or cow products—including anesthesia, intravenous fluids, prostheses, sutures, and pills coated with gelatin. *See* Catherine Easterbrook & Guy Maddern, *Porcine and Bovine Surgical Products*, 143 Archives of Surgery 366, 367–68 (2008); S. Pirzada Sattar, Letter to the Editor, *When Taking Medications Is a Sin*, 53 Psychiatric Services 213, 213 (2002).

If employers were permitted to withhold, from employees' compensation, insurance coverage for these or other medical treatments—based on the religious views of the companies' owners—it would "operate[ ] to impose the employer's religious faith on

the employees." *United States v. Lee*, 455 U.S. 252, 261 (1982). That result is untenable in the commercial marketplace, especially as the workplace becomes more and more diverse. Ultimately, "[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.*

B. RFRA does not apply to all asserted burdens, especially when the requested exemptions would interfere with the rights of third parties.

Because unfettered application of RFRA would interfere with the religious freedom and free exercise of others, a RFRA plaintiff does not establish a substantial burden on religious exercise merely by alleging one. Rather, the Court must make an independent legal determination about whether the asserted burden, even if sincerely held and intensely felt, is "substantial" as a matter of law.

1. Congress and the Court have made clear that not all asserted burdens are substantial burdens. The statute prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that the burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b).

The use of the word "substantially" was no accident. While RFRA's first draft prohibited the government from imposing any burden whatsoever, Congress added "substantially" to make clear that

"the compelling interest required by the Religious Freedom Act applies only where there is a substantial burden placed on the individual free exercise of religion," and that RFRA "does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. S14350–01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). Congress reiterated that RFRA "would not require [a compelling governmental interest] for every government action that may have some incidental effect on religious institutions." S. Rep. No. 103-111, at 9 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1892, 1898.

Without a rigorous inquiry into whether a burden is "substantial" as a matter of law, strict scrutiny would apply to even the slightest asserted burden on religious exercise, however minor or incidental. Lest the entire federal code submit to strict scrutiny, Plaintiffs must establish that the challenged federal requirement burdens religious exercise in a manner that the law recognizes as substantial, rather than incidental and attenuated.

2. A decision exempting Plaintiffs from the contraception regulations would impose significant costs on Plaintiffs' employees. These employees would be required to compromise their own medical care—or to pay substantially more for it—to accommodate the religious preference of their employers' owners. RFRA does not authorize, let alone require, exemptions that harm the interests and burden the religious exercise of third parties.

During debates over RFRA, the accommodations contemplated by Congress would not have imposed substantial costs or burdens on third parties. In addition to concerns about the impact of zoning and

historical-preservation regulations on houses of worship, "much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs." *City of Boerne v. Flores*, 521 U.S. 507, 530–31 (1997); *see also, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 12, 1993) (statement of Rep. Cardin) (allowing burial of veterans in "veterans' cemeteries on Saturday and Sunday … if their religious beliefs required it"); *id.* (precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350–01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (allowing parents to home school their children); *id.* (allowing individuals to volunteer at nursing homes). None of those accommodations would have required third parties to forfeit federal protections, including those governing employment compensation.

The Court has long taken the same approach. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court granted the requested accommodation because it would not "abridge any other person's religious liberties." *Id.* at 409. In *Lee*, the Court rejected an employer's request for a religious exemption from paying social-security taxes; the requested exemption, the Court explained, would "operate[ ] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), the Court invalidated a statute requiring employers to accommodate sabbatarians in all instances, because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. In rejecting an Establishment Clause challenge to accommodations for prisoners' religious ex-

ercise, the Court observed that prison officials would need to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). And in the context of Title VII of the Civil Rights Act, the Court held that the statute's reasonable-accommodation requirement did not authorize an exemption that would have burdened other employees, including "the senior employee [who] would … have been deprived of his contractual rights under the collective-bargaining agreement." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80 (1977).

The only exception to these rules protecting third-parties' interests has arisen in the context of laws affecting church autonomy and the selection of church representatives. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). But that concern about church autonomy is not implicated in these cases brought by for-profit corporations.

By declining to interpret RFRA in a manner that would allow for-profit corporations to shift the costs of their owners' religious beliefs onto third parties, the Court would vindicate not only congressional intent, but the concerns of the Founding Fathers, who themselves recognized the need to cabin religious exemptions that would harm third parties. In the words of James Madison, "I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, *in every case where it does not trespass on private rights* or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 The Writings

of James Madison 98, 100 (Gaillard Hunt ed. 1910), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions66.html (emphasis added). At a time of even greater religious diversity, Madison's concerns carry even greater weight.

II. The Contraception Regulations Do Not Substantially Burden Plaintiffs' Religious Exercise.

Plaintiffs' arguments, if accepted, would enable even for-profit, corporate employers to impose on workers the costs of their employers' owners' religious beliefs. Conversely, application of the contraception regulations to Plaintiffs would not substantially burden the exercise of religion.

A. Plaintiffs are not required to provide any health-insurance plan at all.

Plaintiffs mistakenly assert that they must either violate their religious convictions or incur "ruinous fines." Conestoga Br. 3; *see also* Hobby Lobby Resp. to Pet. 5. But Plaintiffs are not required to provide employees with *any* health-insurance plan. They may choose instead to pay a modest tax, which for virtually all employers will be cheaper than sponsoring an insurance plan. Plaintiffs could pass those savings along to their employees in the form of higher wages, and their employees would be able to obtain coverage, often heavily subsidized, on the public exchanges. This coverage would be comprehensive—employees would not have to forfeit coverage for contraception, or other vital care, due to the religious beliefs of their employers' owners.

1. Large employers like Plaintiffs were offered two alternatives: (1) they can provide, as part of their

employees' compensation, an insurance plan with minimum essential coverage, as defined by 26 U.S.C. § 5000A(f), or (2) they can pay a tax to assist in subsidizing the provision of healthcare on the government exchanges. In other words, employers have a "choice for complying with the law—provide adequate, affordable health coverage to employees or pay a tax." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 98 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013).

Employers who choose the latter option must make a modest "shared responsibility" payment to the Internal Revenue Service. 26 U.S.C. § 4980H(a). The regulations describe this payment as a tax, *id.* § 4980H(c)(7), and it helps to finance subsidies for workers who are not receiving the required comprehensive coverage from their employers. As a result of this system, employees are able to obtain comprehensive coverage in one of two ways: either as part of their employment compensation, or on the exchanges.

The shared responsibility payment will almost always be cheaper than sponsoring a health insurance plan. An employer who does not offer coverage to workers is required to make an annual payment of $2,000 per full-time employee (minus the first 30 employees). *See id.* §§ 4980H(c)(1), 4980H(c)(2)(D). On the other hand, in 2013 the average health insurance premium was $5,884 for single employees and $16,351 for families. Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits: 2013 Annual Survey* 12 (2013), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf. Even after subtracting premium contributions from employees, employers paid an av-

erage of $4,885 for coverage of each single employees and $11,786 for coverage of each family. *See id.* at 72, 73.

Because the shared responsibility payment will inevitably cost "far less than the price of insurance," "[i]t may often be a reasonable financial decision to make the payment rather than [provide] insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595–96 (2012). And if Hobby Lobby and Conestoga declined to offer coverage and made the shared responsibility payments instead, their employees could buy comprehensive health insurance policies—including coverage for contraception—on the exchanges, often with significant subsidies.

2. Plaintiffs have not alleged any specific facts establishing that they are substantially pressured to continue including health insurance in their employees' compensation. Hobby Lobby's complaint is conclusory, asserting only that "[t]he Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they may no longer be permitted to offer health insurance." Hobby Lobby C.A. App. 42a. Although Conestoga suggests in its brief that declining to offer coverage would "violate[ ] [its] religious principles," Conestoga Br. 9, it alleged no such thing in its complaint. *See* Conestoga C.A. App. 38a–70a. Even in its brief, Conestoga relies on a conclusory assertion that if the company refrained from providing coverage, it would face "a competitive disadvantage in the marketplace." Conestoga Br. 39–40. Far from establishing a likelihood of success on the merits necessary to support a preliminary injunction, "the conclusory nature of [Plaintiffs'] allegations … disentitles them to the presumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

Indeed, Plaintiffs are fully able to increase salaries and other benefits, to defray the cost for employees of purchasing insurance on the exchanges, without incurring costs above those necessary to sponsor an insurance plan. Many employers "would gain economically from dropping coverage even if they completely compensated employees for the change through other benefit offerings or higher salaries." Shubham Singhal et al., McKinsey & Co., *How US Health Care Reform Will Affect Employee Benefits*, (2011), http://www.mckinsey.com/insights/health_systems_and_services/how_us_health_care_reform_will_affect_employee_benefits. Although most employees would expect an increase in salary, "more than 85 percent—and almost 90 percent of higher-income ones—say they would remain with an employer that dropped [employer-sponsored insurance]." *Id.*

Even if Plaintiffs had alleged in sufficient detail that replacing health insurance with higher salaries would hurt their ability to recruit certain employees, that type of indirect competitive effect does not constitute a "substantial burden" within the meaning of RFRA. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court rejected a free exercise challenge to a regulation prohibiting businesses from operating on Sundays. Because the plaintiff was an observant Jew, he could not operate his business on Saturday either, and the plurality observed that business owners in his shoes might face "some financial sacrifice in order to observe their religious beliefs." *Id.* at 606. But the option to keep his job and "incur[ ] economic disadvantage" was "wholly different than when … legislation attempts to make a religious practice itself unlawful." *Id.* Here, any competitive disadvantage—even if one had been properly alleged and actually

substantiated—would pale in comparison to the burden at issue in *Braunfeld*.

Plaintiffs have two ways to comply with the law while allowing their employees to make their own healthcare decisions consistent with their own religious beliefs. The companies may offer health insurance as part of their employees' compensation, so long as that health insurance includes all of the required medical coverage, including coverage for contraception. Or they may make the modest shared responsibility payment and allow their employees to obtain subsidized insurance, including coverage for contraception, on the exchanges. But Plaintiffs insist on a third option: they want to deny their workers access to coverage for contraception *and* act in a manner that prevents their employees from obtaining subsidies to buy full coverage elsewhere. RFRA does not entitle for-profit corporations to put their employees in such a bind.

B. Even if Plaintiffs elect to provide health insurance, the contraception regulations impose at most an incidental and attenuated burden on religious exercise.

Even if Plaintiffs were actually or practically required to offer insurance coverage, the burden from including contraception coverage in employee health insurance policies would not be substantial under RFRA. For several reasons, the relationship between Plaintiffs and the contraception regulations is incidental and attenuated: The insurance policies must be purchased by Plaintiffs' secular, for-profit corporations, rather than by the corporations' owners personally. Plaintiffs' secular, for-profit corporations must provide coverage for a comprehensive set of

healthcare services, not contraception alone. And the corporations' group health plans would cover the cost of contraception only if an employee elected to purchase contraception, often after receiving a prescription from her physician.

Each of these intervening steps distances Plaintiffs from the ultimate purchase or use of contraception by their employees, and each prevents Plaintiffs from establishing a substantial burden under RFRA. Nothing about this analysis requires the Court to second-guess Plaintiffs' moral calculations; instead, the Court need only assess whether the burden asserted by Plaintiffs is one that RFRA recognizes as a matter of law.

1. Employees' health insurance is provided not by the individual owners, but by their secular, for-profit corporations.

If Plaintiffs choose to include health insurance in the compensation paid to their employees, any purchase of comprehensive health insurance would be paid for not by individuals who hold religious beliefs about contraception, but instead by secular, for-profit corporations. The individual owners are "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The individual owners' religious beliefs are one step removed from the regulations, which apply only to the secular, for-profit corporations. And the corporations, in turn, are not themselves exercising religion.

The legal difference between an individual owner and a for-profit corporation is no mere technicality. The laws of Pennsylvania and Oklahoma, where the

Plaintiff companies are incorporated, recognize that for-profit corporations are separate legal entities from the corporations' individual owners. *See Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348 (3d Cir. 2001); *NLRB v. Greater Kan. City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993). This distinction between owner and corporation applies even to companies that are closely held or family owned. *See Sautbine v. Keller*, 423 P.2d 447, 451 (Okla. 1966); *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954).

Nor may the owners of Hobby Lobby and Conestoga enjoy corporate benefits while shedding unwanted corporate obligations. They have taken advantage of the unique benefits offered by the corporate form, and they have used that corporate form to make money in the secular marketplace for craft supplies, books, and specialty wood products. Because they have done so, they must "accept the disadvantages of the corporate system along with its advantages." *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 536 (1941).

Further, although churches and other houses of worship may be subject to a different analysis, the corporations here engage in secular activity (the operation of craft and book stores, and the manufacture of wooden parts for kitchen cabinets) for secular ends (financial profit). Hobby Lobby argues that the company exercises religion because, among other things, its statements of purpose reflect commitment to biblical principles, and its stores play Christian music, avoid promoting alcohol, and are closed on Sundays. Hobby Lobby Resp. to Pet. 2–3. Conestoga similarly contends that the company has contributed to unspecified charities, adheres to a mission statement

referencing "Christian principles," and—just before filing suit—adopted "The Hahn Family Statement on the Sanctity of Human Life." Conestoga Br. 5, 16. But these company statements and incidental charitable contributions do not make Plaintiffs' day-to-day commercial transactions, including the payment of compensation to employees, any less secular.

Plaintiffs also cannot establish a religious identity for Mardel, which "primarily sells Christian materials." Hobby Lobby Resp. to Pet. 2. Mardel operates to make financial profit, and courts have refused to ascribe religious significance to for-profit commercial activity, even when that activity is conducted by a house of worship. *See, e.g.*, *United States v. Sandia*, 188 F.3d 1215, 1218 (10th Cir. 1999) (rejecting RFRA challenge to endangered species law where defendant sold protected bird "for pure commercial gain"); *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, No. M2012-00625-COA-R3-CV, 2013 WL 1188949, at *10 (Tenn. Ct. App. Mar. 21, 2013), *appl. for permission to appeal denied* (Tenn. Sept. 10, 2013) (religious-accommodation law did not require property tax exemption for church's "retail establishment housed within the walls of the [church building], complete with paid staff, inventory control, retail pricing, and a wide array of merchandise for sale to the general public"). The connection between Mardel and religious exercise is likewise attenuated by Mardel's decision to sell religious publications for "pure commercial gain." *Sandia*, 188 F.3d at 1218.

2. Contraception coverage is just one benefit within a comprehensive insurance plan.

Plaintiffs are required to provide their employees with a comprehensive insurance policy that covers

contraception as one item within a wide range of healthcare products and services. Among other things, groups health plans must cover an extensive list of preventive services, including "immunizations," "evidence-informed preventive care and screenings" for infants and children, and "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force." 42 U.S.C. § 300gg-13(a). In a plan this comprehensive, there is no connection between Plaintiffs and any particular benefit.

The Court has held that an entity authorizing a range of expenditures does not necessarily promote any particular item obtained with those funds. In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court concluded that a public university would not endorse religion by funding religious-student-group publications to the same extent that the university funded the publications of non-religious groups. *See id.* at 841–43. Similarly, in *Board of Education v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990), the Court concluded that the Establishment Clause permitted student religious groups to meet on public-school premises during non-instructional time, under the same terms as non-religious groups, in part because even "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis." *Id.* at 250.

The provision of a comprehensive insurance policy, rather than coverage for contraception alone, similarly stretches the connection between Plaintiffs and any particular medical procedure or service that is

ultimately covered by the insurance plan. This is especially true where, as here, Plaintiffs "remain[ ] free to disassociate [themselves]" from the purchase or use of contraception by refraining from using contraception and encouraging others to do the same. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

Nor does the decision to self-insure mean that Hobby Lobby or Conestoga directly provides contraception to their employees. Under the Employee Retirement Income Security Act, even a company-funded group health plan is considered to be legally distinct from the company itself. *See* 29 U.S.C. § 1132; *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 373 (1990). Plaintiffs, moreover, can at any time contract with a third-party insurance company to provide insurance coverage, such that any reimbursement for contraception would be made by the third-party insurance company, not by Hobby Lobby or Conestoga's group health plans.

3. Contraception is used and financed only after an employee's independent decision.

Any reimbursement for the purchase of contraception takes place only after one or more of Plaintiffs' employees chooses to use contraception. That independent conduct—a private medical decision made by doctor and patient—further distances Hobby Lobby and Conestoga from any purchase or use of contraception.

In addressing First Amendment claims, the Court has held that intervening private, independent action breaks the causal chain between the original funding source and the ultimate use of such funds. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the

Court rejected an Establishment Clause challenge to an Ohio school-voucher program, under which parents could use their vouchers at religious or non-religious schools, in part because "[w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child." *Id.* at 646. In these circumstances, any incidental advancement of religion was "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652. Similarly, in *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), the Ninth Circuit rejected a RFRA challenge to a public university's mandatory student-activity fee, part of which subsidized student health-insurance plans that covered abortion services; although plaintiffs' "sincerely held religious beliefs prevent[ed] them from financially contributing to abortions," the insurance subsidy was "distributed only for those students who elect to purchase University insurance." *Id.* at 1298, 1300.

In other settings, courts have likewise recognized that the chain of causation may become interrupted and thus too remote to support liability. Under tort law, for example, an act is not the proximate cause of a plaintiff's injury if an intervening act breaks the causal chain, as then-Chief Judge Cardozo recognized in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). When considering whether to suppress evidence under the Fourth Amendment, courts must determine whether "the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews*, 445 U.S. 463, 471 (1980). Here, too, the intervening decisions

of individual employees attenuate the connection between Plaintiffs and the provision of contraception.

Because Plaintiffs object to covering certain forms of prescription contraception, there is yet another intervening influence: the employee's physician, who must prescribe such contraception before the employee can obtain it. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (rejecting "the questionable assumption that doctors would prescribe unnecessary medications"). As reflected in virtually all states' product-liability laws, prescribing physicians act as learned intermediaries with independent responsibility for evaluating medical risks in light of the patient's needs. *See, e.g.*, *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001). Ultimately, then, there is no reimbursement for the purchase of contraception by a group health plan without the independent decision of a covered employee and, in many cases, the covered employee's physician.

Plaintiffs cannot point to any decision that grants employers a religious-liberty interest in the way that employees use their compensation. The health benefits provided by Hobby Lobby and Conestoga are "part of an employee's compensation package." *Liberty Univ.*, 733 F.3d at 91. In upholding a state-issued tuition grant to a student who used the grant to attend a religious school to become a pastor, the Court explained that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486–87 (1986).

No matter what their owners' religious beliefs, Hobby Lobby and Conestoga could not decide to pay their employees below the minimum wage—or to pay women less than men—to reduce the risk that employees would use their wages to buy contraception. The Court has rejected free exercise challenges by a religious foundation to minimum wage and overtime requirements of Fair Labor Standards Act, and observed that "[l]ike other employees covered by the Act, [the religious foundation's employees] are entitled to its full protection." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303–05, 306 (1985). Courts have also refused to authorize religious exemptions to the law requiring equal pay for men and women; compliance with this law, notwithstanding a religious school's belief that males were the "head of the house," imposed "at most, a limited burden" on free exercise rights. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1398 (4th Cir. 1990).

Plaintiffs have no greater right to deprive their employees of required non-cash compensation, including health benefits. Employees work for wages, which are subject to minimum wage laws; and for non-cash benefits such as health insurance, which is subject to minimum coverage requirements. One form of compensation affects the other: "Economists are in near-unanimous agreement that workers ultimately pay for health insurance through lower wages...." Thomas Buchmueller et al., *Will Employers Drop Health Insurance Coverage Because of the Affordable Care Act?*, 32 Health Affairs 1522, 1523 (2013), *available at* http://www.dhhs.state.nh.us/sme/documents/article-aca-1522.full.pdf.

Just as an employer may not control how employees use their wages, an employer may not supervise employees' use of their health-benefits compensation. Indeed, even when employers choose to self-finance employee group health plans, federal regulations "protect the privacy of employees' health information against inquiries by their employers." *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1335 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (citing 45 C.F.R. § 164.102 *et seq.*), *aff'd in part & rev'd in part*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Whether to buy or use birth control is an employee's own decision, using her own compensation, in consultation with her own physician, and guided by her own religious beliefs.

4. The Court can and should consider the degree of attenuation between Plaintiffs' obligations and employees' access to contraception.

Relying on *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), Plaintiffs argue that RFRA "does not ask whether [the corporations' owners'] religious exercise or moral calculus is substantial." Conestoga Br. 34. Plaintiffs are of course entitled to their own moral calculus, but here the relevant calculation is purely legal: whether Plaintiffs' religious objections amount to a burden that is "substantial" as a matter of law. The Court's observation in *Thomas*—that "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one"—refuted the state's argument that Thomas "had made a merely personal philosophical choice rather than a religious choice." 450 U.S. at 714–15 (quotation marks omitted). But

Thomas did not instruct the Court to abdicate the responsibility to assess whether, in light of a plaintiff's religious beliefs, the challenged requirement produces a burden that is substantial as a matter of law.

Even after *Thomas*, the Court has continued to assess whether an asserted religious objection amounts to a substantial burden as a matter of law. *See, e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (notwithstanding plaintiff's religious objections to certain provisions of tax code, court must determine "whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one"); *Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) (no substantial burden despite parent's religious objection to government's use of child's Social Security number: "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference"). Most importantly, *Thomas* did not involve a plaintiff that sought to deprive someone else of compensation to which the law entitled her.

If the Court were not permitted to draw legal lines, then employers could intrude on a broad range of employees' personal decisions; virtually any law governing employee compensation could be construed to facilitate behavior offensive to an employer's owner's religious beliefs. Plaintiffs here object to offering insurance policies that cover certain types of contraception. Plaintiffs in another case might object to paying minimum wage to workers who might use the money to purchase these forms of contraception. Plaintiffs in yet another case might object to compensating workers who might use their wages to do research about contraception.

Each of these objections, moreover, could transcend the issue of contraception. Other employers' owners might object to even the incidental facilitation of other medical procedures or treatments, no matter how remote the connection between the employer and the conduct, and no matter how directly the requested exemption would burden the affected employees and hinder *their* rights to the free exercise of religion. Especially when the rights and interests of others are at stake, RFRA should not be read to make each company's owner "a law unto himself." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990).

CONCLUSION

The judgment of the Tenth Circuit should be reversed, and the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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