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., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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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 is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

PARTIES TO THE PROCEEDINGS

Petitioners are Kathleen Sebelius, Secretary of Health and Human Services; the Department of Health and Human Services; Thomas E. Perez, Secretary of Labor; the Department of Labor; Jacob J. Lew, Secretary of the Treasury; and the Department of the Treasury.

Respondents are Hobby Lobby Stores, Inc.; Mardel, Inc.; David Green; Barbara Green; Mart Green; Steve Green; and Darsee Lett.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-166a) is reported at 723 F.3d 1114. The opinion of the district court (Pet. App. 167a-199a) is reported at 870 F. Supp. 2d 1278. A prior decision of the court of appeals denying an injunction pending appeal is unreported but is available at 2012 WL 6930302. Justice Sotomayor's in-chambers opinion denying an injunction pending appeal is reported at 133 S. Ct. 641.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2013. The petition for a writ of certiorari was filed on September 19, 2013, and granted on November 26, 2013. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. See App., *infra*, 1a-45a.

STATEMENT

1. Most Americans with private health coverage obtain it through an employer-sponsored group health plan. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & Tbl. 1-1 (2008). The cost of such coverage is typically covered by a combination of employer and employee contributions, *id.* at 4, with the employer's share serving as "part of an employee's compensation package," *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 91 (4th Cir.) (citation omitted), cert. denied, 134 S. Ct. 683 (2013). The federal government subsidizes group health plans through favorable tax treatment. While employees pay income and payroll taxes on their cash wages, they typically do not pay taxes on their employer's contributions to their health coverage. 26 U.S.C. 106.

Congress has established certain minimum coverage standards for group health plans. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 29 U.S.C. 1185; 42 U.S.C. 300gg-4; see 26 U.S.C. 9811. In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 29 U.S.C. 1185b; 42 U.S.C. 300gg-6.

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable

Care Act or Act),[1] Congress provided for additional minimum standards for group health plans and health insurers offering coverage in the group and individual markets.

a. The Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-services coverage provision). This provision applies to (among other types of health coverage) employment-based group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, see 29 U.S.C. 1185d (Supp. V 2011), and it can thus be enforced by plan participants and beneficiaries pursuant to ERISA's enforcement mechanisms. See 29 U.S.C. 1132(a)(1)(B) and (3).[2]

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

[2] The Secretary of Labor may likewise bring an ERISA enforcement action with respect to such a group plan. 29 U.S.C. 1132(a)(5). The preventive-services coverage provision is also enforceable through the imposition of taxes on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834. (Payment of such a tax by an employer, however, would not relieve a plan of its legal obligation to cover recommended preventive-health services without cost sharing, which would remain as a freestanding ERISA requirement for such group health plans, see 29 U.S.C. 1185d (Supp. V 2011).) In addition, with respect to health insurers in the individual and group markets, States may enforce the Act's health insurance market reforms, including the preventive-services coverage provision. 42 U.S.C. 300gg-22(a)(1) (Supp. V 2011). If the Secretary of Health and Human Services determines that a State "has failed to substantially enforce" one of the insurance market reforms with

"Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011) (IOM Report). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more on responding to acute problems and the urgent needs of patients than on prevention." *Id.* at 16-17.

To address this problem, the Act and its implementing regulations require coverage of a wide range of preventive services without cost, including services such as cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure, 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011); see 75 Fed. Reg. 41,741-41,744 (July 19, 2010); routine vaccination to prevent vaccine-preventable diseases, such as measles and tetanus, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011); see 75 Fed. Reg. at 41,740, 41,745-41,752; and "evidence-informed preventive care and screenings" for infants, children, and adolescents, 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011); see 75 Fed. Reg. at 41,753-41,755.

Further, and as particularly relevant here, the Act requires coverage, "with respect to women, [of] such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported" by the Health Resources and Services Administration (HRSA), which is a component of the Department of

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respect to such insurers, she conducts such enforcement herself and may impose civil monetary penalties. 42 U.S.C. 300gg-22(a)(2) (Supp. V 2011); see 42 U.S.C. 300gg-22(b)(1)(A) (Supp. V 2011); 42 U.S.C. 300gg-22(b)(2) (Supp. V 2011).

Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18. In particular, "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). And women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." *Id.* at 29,302 (statement of Sen. Mikulski); see IOM Report 19-20.

Because HRSA did not have such comprehensive guidelines for preventive services for women, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8725-8726 (Feb. 15, 2012); IOM Report 1-2. The Institute is part of the National Academy of Sciences, a "semi-private" organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); see IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined preventive services as measures "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.* at 3. Based on the Institute's review of the evidence, it recommended a num-

ber of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. *Id.* at 8-12.

The Institute also recommended access to the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as sterilization procedures and patient education and counseling for all women with reproductive capacity. IOM Report 10; see *id.* at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Aug. 27, 2013) (*Birth Control Guide*).

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies can have adverse health consequences for both mothers and children. IOM Report 102-103. In addition, the Institute observed, use of contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103.

HRSA adopted women's preventive-health guidelines consistent with the Institute's recommendations, including a guideline recommending access to all FDA-approved contraceptive methods as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, App., *infra*, 40a-45a.

The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require non-grandfathered group health plans to cover, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred to in this brief as the contraceptive-coverage provision).

b. The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of a "religious employer." 45 C.F.R. 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)).

The implementing regulations also provide accommodations for the group health plans of religious nonprofit organizations that have religious objections to providing coverage for some or all contraceptive services. 45 C.F.R. 147.131(b). After such an organization accepts an accommodation, the women who participate in its plan will generally have access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations, under which the organization does not contract, arrange, pay, or refer for contraceptive coverage. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

c. The preventive-services coverage provision in general, and the contraceptive-coverage provision in

particular, apply only if an employer offers a group health plan. Employers, however, are not required to offer group health plans. Certain employers with more than 50 full-time-equivalent employees are subject to a tax if they do not offer coverage, 26 U.S.C. 4980H, and they thus are afforded a choice between offering a group health plan and the prospect of paying the tax. See *Liberty Univ.*, 733 F.3d at 98; cf. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2596-2597 (2012).

3. Respondents are two for-profit corporations—Hobby Lobby Stores, Inc., and Mardel, Inc.—and five individuals who indirectly own the corporations (collectively referred to as the Greens).[3] Hobby Lobby is a national chain of more than 500 arts-and-crafts stores with more than 13,000 full-time employees. Pet. App. 171a. Mardel is a chain of 35 book stores specializing in Christian materials and has 372 employees. *Ibid.* Employees of both corporations obtain health coverage through the self-insured Hobby Lobby group health plan. *Id.* at 14a.

The Greens maintain the sincere religious conviction "that human life begins at conception," that is, "when sperm fertilizes an egg." Pet. App. 9a, 14a. After learning about the contraceptive-coverage provision, Hobby Lobby "re-examined its insurance policies," discovered that the policies already covered certain FDA-approved contraceptives to which the Greens object, and proceeded to exclude those contraceptives from coverage. J.A. 139-140 (Verified Compl. para. 55). Respondents also initiated this suit, J.A.

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[3] The Greens are trustees of a management trust that owns and operates Hobby Lobby and Mardel. Pet. App. 8a, 171a; see Pet. 9 n.4.

124-169, contending that the requirement that the Hobby Lobby group health plan cover all forms of FDA-approved contraceptives as prescribed by a physician violates rights of the corporations and the Greens under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). Specifically, respondents contend that RFRA entitles the Hobby Lobby plan to an exemption from the contraceptive-coverage provision because the Greens object to "facilitating" coverage of four FDA-approved contraceptives (two types of IUDs and two emergency contraceptives, Plan B and ella). Pet. App. 14a.[4]

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[4] According to FDA-approved product labels, a copper IUD is a device inserted into the uterus by a healthcare provider that works by interfering with sperm transport and fertilization of an egg and possibly by preventing implantation (of a fertilized egg in the uterus). FDA-approved label for ParaGard T 380A Intrauterine Copper Contraceptive 3 (June 11, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/018680s066lbl.pdf. An IUD with progestin is a device inserted into the uterus by a healthcare provider that works by thickening cervical mucus preventing passage of sperm into the uterus, inhibiting sperm capacitation or survival, and altering the endometrium. FDA-approved label for Mirena (levonorgestrel-releasing intrauterine system) 18 (Aug. 7, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/021225s032lbl.pdf; FDA-approved label for Skyla (levonorgestrel-releasing intrauterine system) § 12.1 (Sept. 13, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/203159s002lbledt1.pdf. Plan B is an emergency contraceptive in pill form that works principally by preventing ovulation or fertilization by altering tubal transport of sperm and/or ova; it may

The district court denied respondents' motion for a preliminary injunction, holding that they had not established a likelihood of success on the merits of their claims. Pet. App. 167a-199a.

4. The court of appeals denied respondents' motion for an injunction pending appeal. 2012 WL 6930302. Respondents then applied to this Court for emergency relief, which Justice Sotomayor denied. 133 S. Ct. 641 (2012).

5. In a divided decision, the en banc court of appeals reversed the judgment of the district court. Pet. App. 1a-166a.

a. After addressing jurisdictional issues, the majority held that the respondent corporations are likely to succeed on the merits of their RFRA claims. Pet. App. 6a, 23a-61a. The court first held that "for-profit corporations, such as Hobby Lobby and Mardel, are persons exercising religion for purposes of RFRA." *Id.* at 23a; see *id.* at 23a-43a. Because the Greens believe that life begins at conception, see *id.* at 9a, the

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inhibit implantation (of a fertilized egg in the uterus) by altering the endometrium, but it is not effective once the process of implantation has begun. FDA-approved label for Plan B (levonorgestrel) tablets, 0.75mg, 4 (July 10, 2009), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021045s015lbl.pdf. Ella, another emergency contraceptive, is a pill that works by inhibiting or delaying ovulation and may also work by altering the endometrium in a way that may affect implantation (of the fertilized egg in the uterus). FDA-approved label for ella (ulipristal acetate) tablet § 12.1 (May 2, 2012), http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022474s002lbl.pdf.

Although respondents describe these devices and drugs as "abortion-causing" (J.A. 147-148 (Verified Compl. para. 106)), federal law, which defines pregnancy as beginning at implantation, does not so classify them. See, *e.g.*, 62 Fed. Reg. 8611 (Feb. 25, 1997); 45 C.F.R. 46.202(f).

court declared that "[t]he corporate plaintiffs believe life begins at conception," *id.* at 50a, and concluded that the contraceptive-coverage provision "requires Hobby Lobby and Mardel to * * * compromise their religious beliefs." *Id.* at 52a. The court held that "Hobby Lobby and Mardel have established a substantial burden as a matter of law." *Ibid.*

Applying RFRA's compelling-interest test, the court of appeals held that the interests advanced by the contraceptive-coverage provision cannot be compelling because there is a regulatory exemption from that requirement for the plans offered by religious employers; because plans are not subject to the preventive-services coverage provision (and certain other ACA requirements) if they retain grandfathered status; and because of what the court described as an exemption for plans offered by employers with fewer than 50 full-time-equivalent employees. Pet. App. 58a-59a.

b. Judge Gorsuch (joined by two other judges) concurred, Pet. App. 77a-94a, positing that "the Greens themselves, as individuals, are also entitled to relief," *id.* at 77a.

c. Chief Judge Briscoe, joined by Judge Lucero, dissented in relevant part. Pet. App. 103a-138a. Rejecting the corporations' claims, Chief Judge Briscoe reasoned that, "during the 200-year span between the adoption of the First Amendment and RFRA's passage," this Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Id.* at 115a. Chief Judge Briscoe thus found "no plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id.*

at 118a (internal quotation marks and citation omitted).

Chief Judge Briscoe further concluded that the majority's substantial-burden analysis disregarded "basic principles of corporation law," by treating "the religious beliefs of the individual plaintiffs as those of Hobby Lobby and Mardel." Pet. App. 130a-131a. She also rejected the idea that "company [owners'] religious beliefs and practices are implicated by the autonomous health care decisions of company employees" to use their health coverage in ways that offend an owner's religious beliefs. *Id.* at 137a-138a (brackets in original; citation omitted).

6. On remand, the district court entered a preliminary injunction. 2013 WL 3869832 (July 19, 2013). The government's appeal from that order is stayed pending this Court's decision in this case. See Order, *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 13-6215 (10th Cir. Sept. 26, 2013).

SUMMARY OF ARGUMENT

The Greens' sincerely held religious opposition to certain forms of contraception is not subject to question in these proceedings, and their personal beliefs merit the full measure of protection that the Constitution and laws provide. But the *Greens'* beliefs, although deeply held, do not justify an injunction under the Religious Freedom Restoration Act exempting *Hobby Lobby* and *Mardel* from an obligation to comply with a generally applicable law that regulates only those corporations and not their individual owners. Granting the relief respondents seek for profit-making corporate entities engaged in commercial activity would expand the scope of RFRA far beyond anything Congress contemplated; would disregard

deeply engrained principles of corporation law that should inform the interpretation of RFRA as they do federal statutes generally; and would deny to thousands of employees (many of whom may not share the Greens' religious beliefs) statutorily-guaranteed access to benefits of great importance to health and well-being.

1. Respondents Hobby Lobby and Mardel, for-profit corporations conducting commercial enterprises, are not persons exercising religion within the meaning of RFRA. Congress enacted RFRA to restore this Court's free-exercise jurisprudence from before *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and directed courts to look to those decisions for guidance when resolving RFRA claims. None of this Court's pre-*Smith* decisions held, or even suggested, that for-profit corporations exercise religion. Instead, those decisions recognized free-exercise rights of individuals, churches, and religious communities. Because Congress intended RFRA to restore, not dramatically extend, pre-*Smith* law, the statute should be interpreted to embody the same limitation.

The corporate-respondents' RFRA claim fails for the independent reason that it attributes the religious beliefs of the corporate shareholders to the corporate-respondents themselves. That approach violates the long-settled principle of corporation law (against the backdrop of which RFRA was enacted) that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001).

2. Respondents' alternative suggestion that the Greens may challenge the contraceptive-coverage provision in their individual capacities likewise suffers from threshold defects. The challenged provision imposes no personal obligations on the Greens; it instead regulates only the corporations they own and the group health plan the corporations sponsor. The provision therefore does not burden the Greens' individual exercise of religion in any cognizable sense, and RFRA does not entitle them to an exemption *for the corporations* based on their *individual* religious beliefs.

3. The particular burden about which respondents complain also does not qualify as a substantial burden within the meaning of RFRA. A group health plan covers many items and services, and participants and their dependents, in consultation with their health-care providers, decide which ones to use. Those decisions by independent third parties are not attributable to the employer that finances the plan or to the individuals who own the company, and the connection is too indirect as a matter of law to impose a substantial burden.

4. The contraceptive-coverage provision in any event is supported by compelling interests and is the least restrictive means of achieving them. The preventive-services coverage provision grants participants and beneficiaries in the Hobby Lobby group health plan privately-enforceable benefits as part of a comprehensive insurance scheme, and the exemption respondents seek would deny those individuals the health coverage to which they are legally entitled as part of their employment compensation. This Court's religion-clause jurisprudence does not compel that

employees be denied statutory benefits, or forced to bear other costs, to accommodate an employer's sincerely held religious beliefs. The provision also serves compelling interests in public health and gender equality. Those interests are supported by a wealth of empirical data demonstrating that providing women access to contraceptives without cost-sharing has significant health benefits for them and their children, and, conversely, that financial barriers to such access can result in significant health problems.

Respondents' only proffered alternative—direct government provision of contraceptive services to corporate-respondents' employees—is not a less restrictive means within the meaning of RFRA. The less-restrictive means test under RFRA cannot be used to require creation of entirely new programs. Moreover, in both the preventive-services coverage provision and the Act generally, Congress built upon the system of employment-based coverage and private insurance, rather than replacing it with government-provided benefits. Respondents' proffered alternative would conflict with that goal.

ARGUMENT

I. THE RESPONDENT-CORPORATIONS FAIL TO STATE A CLAIM UNDER RFRA

A. RFRA Does Not Grant Free-Exercise Rights To For-Profit Corporations

The claims of the respondent for-profit corporations fail at the threshold because they are not persons exercising religion within the meaning of RFRA.

1. Congress enacted RFRA "to restore the compelling interest test" applied by this Court in free-exercise cases decided before *Employment Division*

v. *Smith*, 494 U.S. 872 (1990). 42 U.S.C. 2000bb(b)(1); see 42 U.S.C. 2000bb(a)(4) and (5); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (*O Centro*). In *Smith*, this Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. See 494 U.S. at 876-890. RFRA "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*," providing that "the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability,'" unless the government satisfies a compelling-interest test. *O Centro*, 546 U.S. at 424 (quoting 42 U.S.C. 2000bb-1(a)). Given this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same).

2. The respondent-corporations are not "person[s] exercis[ing] religion" (42 U.S.C. 2000bb-1(a)) within the meaning of RFRA. None of this Court's pre-*Smith* decisions held (or even suggested) that for-profit corporations exercise religion within the meaning of the Free Exercise Clause.

Under pre-*Smith* decisions, individuals could seek certain exemptions from generally applicable regulations that burdened their exercise of religion. The two cases that Congress cited in RFRA itself are illustrative. See 42 U.S.C. 2000bb(b)(1) (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)). In *Sherbert*, the Court held that a state government could not deny unemployment

compensation to an individual who was discharged by her employer because she would not work on her Sabbath. 374 U.S. at 399-410. In *Yoder*, the Court held that a state government could not compel Amish parents to send their children to high school. 406 U.S. at 234-235.

Under the Court's free-exercise case law, churches and religious communities can also assert free-exercise claims. For example, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (*Lukumi*), a church successfully challenged a local ordinance that made it unlawful for its members to perform the ritual animal sacrifice that is part of the Santeria religion. *Id.* at 525, 531-540, 542-547.[5] Accordingly, when this Court later applied RFRA in *O Centro*, it held that RFRA allowed "a Christian Spiritist sect" to obtain an exemption from a federal law (the Controlled Substances Act, 21 U.S.C. 801 *et seq.*) that prevented its members from receiving communion in the form of a sacramental tea. 546 U.S. at 425, 427-439.

In contrast, no pre-*Smith* case held, or even suggested, that for-profit corporations have religious beliefs that could in turn be impermissibly burdened under the First Amendment by general corporate regulation. The two cases on which the court of appeals relied for the contrary proposition, Pet. App. 35a-36a (citing *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *United States* v. *Lee*, 455 U.S. 252 (1982)),

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[5] *Lukumi* was decided after *Smith*, but ruled for the plaintiffs on the ground that the challenged statute targeted plaintiffs' religious practices for disfavored treatment, thus making it subject to the compelling-interest test (which it failed). See *Lukumi*, 508 U.S. at 532-540, 542-547.

rejected free-exercise claims raised by *individuals*. In *Braunfeld*, the Court rejected the free-exercise claim asserted by Orthodox Jewish individuals who faced criminal prosecution if they sold their goods on Sundays, even though the Sunday closing law placed substantial pressure on them "to give up their [Saturday] Sabbath observance, a basic tenet of the Orthodox Jewish faith." 366 U.S. at 602 (plurality opinion). And, in *Lee*, the Court rejected an Amish carpenter's claim that he had a free-exercise right to be exempted from the requirement to pay Social Security taxes on behalf of his Amish employees. 455 U.S. at 256-261. *Braunfeld* and *Lee* did not involve for-profit corporations, but rather individual sole proprietors who faced personal liability under the regulations they challenged. See *Braunfeld*, 366 U.S. at 601; Appellant's Br. 5-6, *Braunfeld*, *supra*, (No. 67); see also *Lee*, 455 U.S. at 254; Appellee's Br. 1, *Lee*, *supra* (No. 80-767).

On the same day the Court issued its decision in *Braunfeld*, it separately addressed a similar free-exercise challenge to a Sunday closing law advanced by an incorporated kosher supermarket. See *Gallagher* v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961). A plurality of the Court determined that it "need not decide" whether the corporation could assert a free-exercise claim because, in *Braunfeld*, the Court had rejected the claim "on the merits." *Gallagher*, 366 U.S. at 631. The express reservation of the question in *Gallagher* confirms that this Court's pre-*Smith* decisions had not afforded free-exercise rights to for-profit corporations.

3. There is no reason to think that Congress intended RFRA to grant for-profit corporations rights that previously had been reserved to individuals and

religious non-profit institutions. For-profit corporations "are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." *Gilardi* v. *United States Dep't of Health & Human Servs.*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), petition for cert. pending, No. 13-567 (filed Nov. 5, 2013); see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in the judgment) ("[U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce.").

It has long been understood that when corporations enter the commercial world for profit, they necessarily "submit themselves to legislation—such as Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Affordable Care Act—designed to protect the health, safety, and welfare of employees." *Gilardi*, 733 F.3d at 1242-1243 (Edwards, J., concurring in part and dissenting in part); see pp. 38-46, *infra* (discussing compelling interest in protecting statutory rights of corporate-respondents' employees).

The idea that federal law would require corporate employees (such as the 13,000 employees of Hobby Lobby) to give up statutorily protected rights in order to accommodate the asserted exercise of religion of a for-profit corporation would have been a foreign concept to the Congress that enacted RFRA. Congress had at that time enacted religion-based exemptions for employers in some employment-regulation stat-

utes, but those exemptions were all limited to churches and other religious non-profit institutions. *E.g.*, 42 U.S.C. 2000e-1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its activities"); see 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 80, at 61 (perm. ed., rev. vol. 2010) (noting that a "religious corporation" is a "special class of nonprofit corporation[]").

While Title VII's exemption for religious employers burdens employees whose religion differs from that of their employer, Congress viewed that burden as a cost that was justified to protect "religious organizations[']* * * interest in autonomy in ordering their internal affairs." *Amos*, 483 U.S. at 340, 341 (Brennan, J., concurring in the judgment). That understanding is consistent with the First Amendment's "special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012) (*Hosanna-Tabor*). By contrast, neither this Court's cases nor pre-RFRA federal employment statutes provided for-profit corporations an exemption from generally applicable law on the premise that the corporation was exercising religion. There is no reason to conclude that Congress intended RFRA to embody a fundamentally different understanding.

3. The "limitation of RFRA's applicability to individuals and non-profit religious organizations is reinforced by examining the legislative history of RFRA."

Pet. App. 115a (Briscoe, C.J., dissenting in relevant part). The committee reports, hearings, and debates are filled with references to individuals and religious institutions, but "[e]ntirely absent from the legislative history * * * is any reference to for-profit corporations." *Id.* at 116a.

This Court reviewed RFRA's legislative record in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and observed that "[m]uch of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs." *Id.* at 530-531. The hearings and committee reports also showed concern that "zoning regulations and historic preservation laws * * * have adverse effects on churches and synagogues." *Id.* at 531. "But nowhere" in RFRA's legislative history "is there any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations." Pet. App. 117a (Briscoe, C.J., dissenting in relevant part).

Had Congress, in enacting RFRA, intended to extend free-exercise rights to for-profit corporations for the first time in our Nation's history, there would surely have been some express mention of that intent in either the statutory text or in the legislative history. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991); see also *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). There is none.

4. The court of appeals mistakenly believed that Congress's use of the term "person" in RFRA compels the conclusion that the statute grants rights to for-profit corporations. Pet. App. 24a. The court of appeals relied on the Dictionary Act, which states that the term "person" in a federal statute includes corpo-

rations unless "the context indicates otherwise." *Ibid.* (quoting 1 U.S.C. 1).

The court of appeals' "focus on personhood is too narrow; instead, [a court] must construe the term 'person' together with the phrase 'exercise of religion.'" *Gilardi*, 733 F.3d at 1211. The Dictionary Act does not address the question whether for-profit corporations are "person[s]" that engage in the "exercise of religion" in the sense Congress intended in RFRA. See 42 U.S.C. 2000bb-1(a) and (c). Nor does RFRA's definition of "exercise of religion" speak to that issue. *Gilardi*, 733 F.3d at 1211-1212. RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, simply states that "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000bb-2(4), 2000cc-5(7)(A).

Because the text of neither RFRA nor the Dictionary Act supports the conclusion that for-profit corporations are "person[s]" that themselves engage in the "exercise of religion" in the sense Congress intended, the Court must turn to "the full body" of "free-exercise caselaw" that pre-dated *Smith*. *Gilardi*, 733 F.3d at 1212. And, as discussed above, "during the 200-year span between the adoption of the First Amendment and RFRA's passage," this Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." Pet. App. 115a (Briscoe, C.J., dissenting in relevant part). RFRA must be interpreted to reflect the same limitation.

B. RFRA Does Not Authorize Claims That Disregard Fundamental Tenets Of American Corporation Law

The corporate-respondents' RFRA claim fails for the further reason that the claim "treat[s] the religious beliefs of the individual plaintiffs as those of Hobby Lobby and Mardel." Pet. App. 130a-131a (Briscoe, C.J., dissenting in relevant part). Based on "*[t]he Green family's* religious beliefs," respondents contend that *Hobby Lobby* is entitled to an exemption to the contraceptive-coverage provision "consistent with *its* faith." J.A. 139 (Verified Compl. paras. 53, 55).

That approach runs afoul of basic principles of corporation law that inform the interpretation of federal statutes, including RFRA. As this Court has emphasized, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001) (*Cedric Kushner*); see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946) (per curiam).

Few norms are more deeply ingrained into the fabric of American law than the principle that "a corporation and its stockholders are deemed separate entities." *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442 (1934). And this Court has consistently in-

terpreted federal statutes in a manner that respects this bedrock norm. For example, in *Cedric Kushner*, the Court held that the owner of a corporation can be liable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for conducting the affairs of the corporation through a pattern of racketeering activity. The Court noted that RICO requires some "distinctness between the RICO defendant and the RICO enterprise," 533 U.S. at 162 (citation omitted), and concluded that this distinctness requirement was met. The Court explained that the "corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Id.* at 163.

In *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), the Court relied on the same principle to reject a civil rights claim brought by the sole shareholder of a closely held corporation because the alleged injury was suffered only by the corporation. The shareholder alleged a violation of 42 U.S.C. 1981, which protects the right of all persons to "make and enforce contracts" without respect to race, based on the defendant's alleged breach of its contract with the corporation because of the shareholder's race. 546 U.S. at 474-475 (quoting 42 U.S.C. 1981). This Court unanimously held that the shareholder did not have a cause of action because the right to make and enforce the contract belonged to the corporation, rather than to the owner. See *id.* at 477. The Court reasoned that "it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and

is exposed to no liability under the corporation's contracts." *Ibid.* Just as the shareholder's decision to operate his business as a corporation "protected his personal assets, even though he 'negotiated, signed, performed, and sought to enforce' contracts" for the corporation, "[t]he corporate form and the rules of agency similarly den[ied] him rights under those contracts." *Ibid.*

Similarly, in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), this Court interpreted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, in light of the background principle that a parent corporation is distinct from its subsidiaries and thus not liable for its subsidiaries' actions. See 524 U.S. at 61. "Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature," the Court concluded that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." *Id.* at 62.[6]

The same reasoning applies here. Nothing in RFRA purports to reject the bedrock principle that a corporation is legally distinct from its owners. There is thus no basis on which to impute the individual-respondents' religious beliefs to the corporate-respondents. The court of appeals deemed it significant that Hobby Lobby and Mardel are "closely held"

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[6] Like that of every other State, the law of Oklahoma, where Hobby Lobby is incorporated, reflects the same principles, specifying that corporations, including family-owned ones, are legal entities that are "separate and distinct" from their shareholders. *Sautbine* v. *Keller*, 423 P.2d 447, 451 (Okla. 1966).

and that the owners are "unanimous" in their religious beliefs. Pet. App. 42a. But, as this Court's *Cedric Kushner* decision illustrates, the tenet that a corporation is distinct from its owners applies even when the corporation has only a *single* shareholder. 533 U.S. at 160, 163; accord *Domino's Pizza*, 546 U.S. at 472, 477. No matter their small number, family relationships, or unanimity, corporate shareholders are not the corporation.[7]

II. THE GREENS' EXERCISE OF RELIGION IS NOT BURDENED BY REGULATION OF THE CORPORATE-RESPONDENTS, AND THE GREENS ARE NOT ENTITLED TO RELIEF THAT EXEMPTS THE CORPORATIONS FROM FEDERAL LAW

Respondents contend that "the Greens themselves have an independently valid claim under RFRA" because 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].'" Resp. Cert. Br. 27 (brackets in original) (quoting Pet. App. 86a (Gorsuch, J., concurring)). This contention fails both because regulation of the corporations does not, as a matter of law, burden the religious exercise of their owners and because the relief respondents

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[7] The court of appeals' implicit suggestion (Pet. App. 42a-43a & n.12) that its holding was limited to corporations that are not publicly-traded, even if analytically sound, would still allow for significant RFRA-created gaps in employment regulation. In 2008, *Forbes* estimated that the largest privately-held corporations in the United States employed 6.2 million people and had $1.8 trillion in revenue. See *America's Largest Private Companies*, Forbes (Nov. 6, 2008), www.forbes.com/2008/11/03/largest-private-companies-biz-privates08-cx_sr_1103private_land.html.

seek—an injunction exempting *the corporations* from the contraceptive-coverage provision—does not follow from the injury they allege.

Federal law does not require *the Greens* to provide health insurance, particular health benefits, or any other form of compensation to the corporations' employees. The Greens do not personally employ the 13,000 individuals who work for Hobby Lobby; the corporation does. See *Sipma* v. *Massachusetts Cas. Ins. Co.*, 256 F.3d 1006, 1010 (10th Cir. 2001) ("Because a corporation enters into contracts in a capacity separate and distinct from its shareholders, the corporation, not the shareholder, is the employing party in an employment relationship."). It is Hobby Lobby that sponsors the group health plan, and "it is that health plan which is now obligated by the Affordable Care Act and resulting regulations to provide contraceptive coverage." *Grote* v. *Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting); see 29 U.S.C. 1132(d)(1) (a group health plan is a legal entity distinct from its sponsoring employer under ERISA).

The Greens would face no personal liability for any failure by Hobby Lobby and its group health plan to comply with the contraceptive-coverage provision. The Hobby Lobby plan (not the Greens) would be subject to a suit by a plan participant or beneficiary or other enforcement action under ERISA for any failure to provide statutorily required benefits. See 29 U.S.C. 1185d (Supp. V 2011); see also 29 U.S.C. 1132(a)(1)(B), (3), and (5). The corporate-respondents (not the Greens) would be subject to any tax penalty for such a failure. See 26 U.S.C. 4980D; see also 26 U.S.C. 9815(a)(1), 9834.

It follows that RFRA grants the Greens as individuals no right to challenge an obligation that applies only to the corporate-respondents. The Greens "conduct business through [corporations], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood Specialties Corp.* v. *Secretary of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir.), cert. granted, 134 S. Ct. 678 (2013). The corporations they formed are distinct legal entities, and nothing in RFRA overrides that bedrock principle of corporation law.

The longstanding shareholder standing rule, under which "shareholders of a corporation cannot bring claims intended to redress injuries to a corporation, even when the corporation is closely held," *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), petition for cert. pending, No. 13-482 (filed Oct. 15, 2013), reflects this same corporate-law principle. That rule "recognizes that corporations are entities separate from their shareholders in contradistinction with partnerships or other unincorporated associations." *Smith Setzer & Sons, Inc.* v. *South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994). Although the rule "is regularly encountered in traditional business litigation, it also has been uniformly applied on the infrequent occasions it has arisen in suits against the state for statutory or constitutional violations." *Ibid.*; see *Diva's, Inc.* v. *City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005) (dismissing sole shareholder's First Amendment claim for lack of standing); *Guides, Ltd.* v. *Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1070, 1071-1073 (10th Cir. 2002) (race discrimination claim); *Potthoff* v. *Morin*, 245 F.3d 710, 717-718 (8th Cir. 2001) (First Amend-

ment claim); *Chance Mgmt., Inc.* v. *South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996) (Privileges and Immunities Clause claim), cert. denied, 519 U.S. 1149 (1997); *Smith Setzer & Sons, Inc.*, 20 F.3d at 1317 (same).

Respondents contend that the Greens may assert claims as individuals because they work as officers and managers of the corporations and the provision "requires [them as individuals] * * * directly and personally to take *affirmative* action contrary to their religious beliefs." Resp. Cert. Br. 28 (quoting Pet. App. 161a (Matheson, J., concurring in part and dissenting in part)); see Pet. App. 78a (Gorsuch, J., concurring).

As an initial matter, respondents' premise is incorrect. The provision imposes obligations on the corporations as employers. Nothing in federal law requires the Greens to play any particular role at the corporations, much less in one related to employee benefits. Further, self-insured group health plans (like the one for the corporate-respondents) are not generally administered directly by corporate managers but instead by third-party administrators, which "are hired by plan sponsors to process claims and administer other administrative aspects of employee benefit plans." 78 Fed. Reg. at 39,879 n.40; see *id.* at 39,880.

Even putting aside those issues, respondents' argument based on the Greens' role as managers does not overcome respondents' conflation problem; it compounds that problem. As owners, the Greens are distinct from the corporation. As managers, they have an additional, but equally distinct role. A manager takes actions on behalf of the corporation itself, not on behalf of himself as an individual. See *Autocam*, 730

F.3d at 623. A manager, like a shareholder, cannot seek to exempt the corporation from regulation on the basis of his individual beliefs. And, if a person who is a manager of a corporation also is a fiduciary of an ERISA plan sponsored by the corporation, his duties in that capacity run solely to the participants and beneficiaries of the plan, following the terms of the plan insofar as they are consistent with ERISA itself. See 29 U.S.C. 1104(a).

Respondents' contrary position (Resp. Cert. Br. 28) would seemingly mean that *any* human resources manager who objects to the contraceptive-coverage provision could sue under RFRA to seek an exemption *for the corporation* that employs him, on the ground that he is the "human actor[]" (Pet. App. 78a (Gorsuch, J., concurring)) responsible for corporate compliance with a requirement to which he has a religious objection. Such a remedy would be unprecedented, and nothing in RFRA purports to authorize it.

Federal law does provide for accommodations of employees' religious beliefs in the workplace, but it does so in a dramatically different way than respondents advocate. Title VII of the Civil Rights Act of 1964 provides that an employee's "religious observance and practice, as well as belief," should be reasonably accommodated unless the employer can show that doing so would pose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j); see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 73-74 (1977) (*TWA*).

Congress did not intend RFRA to change or "affect[]" that settled "religious accommodation" provision in Title VII. Senate Report 13. Before RFRA was enacted, this Court held that a reasonable ac-

commodation under Title VII cannot come "at the expense" of other employees. *TWA*, 432 U.S. at 81. In *TWA*, this Court rejected a Title VII religious accommodation claim of an employee whose religion prohibited him from working on his Sabbath. *Id.* at 76-85. The Court explained that, if the employer were to "allocate days off in accordance with the religious needs of its employees," that would come "at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Id.* at 80-81. "Title VII does not contemplate such unequal treatment." *Id.* at 81. The Court found it "anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Ibid.* Title VII's religious accommodation provision would never be interpreted to permit an objecting employee to secure an exemption from federal law for his employer, much less one that would come at the expense of his fellow employees.

III. RESPONDENTS' RELIGIOUS EXERCISE IS NOT SUBSTANTIALLY BURDENED WITHIN THE MEANING OF RFRA

Respondents' RFRA claims also fail because the particular burden about which they complain does not quality as a "substantial[] burden" within the meaning of RFRA. 42 U.S.C. 2000bb-1(a); see 42 U.S.C. 2000bb-1(b).

The Greens believe that life begins "from the moment of conception" (Resp. Cert. Br. 3), and they object to drugs and devices that could "prevent the implantation of a human embryo in the wall of the

uterus" (J.A. 148-149 (Verified Compl. para. 115)). They contend that it would substantially burden their religious exercise for the group health plan sponsored by the corporations they own to provide health coverage that "would facilitate access" by employees to such drugs and devices. J.A. 140 (Verified Compl. para. 56). Those sincere religious beliefs are, of course, entitled to respect.

Under RFRA, courts are not to inquire into the validity of a religious tenet or evaluate whether it is "central" to a plaintiff's "system of religious belief." 42 U.S.C. 2000cc-5(7)(A); see 42 U.S.C. 2000bb-2(4). That is consistent with the longstanding free-exercise principle that courts may not question where a plaintiff "dr[aws] the line" in defining his own religious belief. *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). But that is a separate question from whether a plaintiff's religious exercise is substantially burdened, which necessarily entails a judgment concerning the legal and practical context in which the plaintiff's claim arises. See *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (court "[a]ccept[ed] as true the factual allegations that [plaintiff's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). The substantial-burden question is a legal one for a court.

The answer to that legal question must be guided by principles regarding which injuries are cognizable and which are not. For example, such principles may exclude claims where the relationship between the claimed injury and the challenged governmental action is too attenuated, as well as claims involving the

actions and rights of independent actors and affected third parties. Likewise, a proffered burden may be deemed not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for, governmental programs that may offend his beliefs. Under these principles, respondents have not alleged a substantial burden as a matter of law.

Hobby Lobby pays money into an undifferentiated fund to finance covered benefits under its ERISA-regulated health plan. Decisions whether to claim such benefits are made by independent third parties: plan participants and beneficiaries (acting in consultation with their health-care providers), who have their own rights under the group health plan and ERISA, see pp. 38-46, *infra*. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Grote*, 708 F.3d at 865 (Rovner, J., dissenting); cf. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002) ("[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."). Indeed, federal law "imposes a wall of confidentiality between an employee's health care decisions * * * and the employer," so the companies would not even know whether any employee was using the contraceptives to which respondents object. *Grote*, 708 F.3d at 858

(Rovner, J., dissenting); see 45 C.F.R. 164.508, 164.510. And, for the reasons discussed above, the Greens as owners of incorporated entities are a further step removed from the employees' decision than are the employing companies themselves.

RFRA does not protect against the burden on religious exercise that "arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien* v. *United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), appeal docketed, No. 12-3357 (8th Cir. argued Oct. 24, 2013). In this respect, respondents' RFRA claim is analogous to free-exercise claims that this Court has rejected as overly attenuated as a matter of law. In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), for example, taxpayers claimed that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges and universities to which they objected. *Id.* at 689 (plurality opinion). The Court rejected that claim because the taxpayers were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." *Ibid.*; see *Lemon* v. *Kurtzman*, 403 U.S. 602, 664-665 (1971) (White, J., concurring in the judgment in *Tilton*). RFRA's legislative history expressly states that the statute was not intended to "change the law" as articulated in *Tilton*. Senate Report 12.

Likewise, in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause

because, "[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve" and that this was "no less an interference with religious liberty than forcing a man to attend a church." Br. of Appellants 35, *Allen*, *supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of plaintiffs "as individuals in the practice of their religion." *Allen*, 392 U.S. at 249; see *Hein* v. *Freedom from Religion Found., Inc.*, 551 U.S. 587, 609-610 (2007) (plurality opinion) (there is "no taxpayer standing to sue under Free Exercise Clause").

Respondents rely on *Thomas* for the proposition that the Court must accept not only their definition of their sincerely held religious belief but also their position that their religious exercise would be substantially burdened by the provision they challenge. See Resp. Cert. Br. 31. That interpretation of *Thomas* cannot be squared with *Tilton* and *Allen*. *Thomas* involved a State's "denial of unemployment compensation benefits to * * * a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments." 450 U.S. at 709. The lower court had concluded that the plaintiff's objection was not truly religious because, had it been, he would have also objected to working for a steel company whose product was used to make the armaments. *Id.* at 714-715. This Court rejected that approach, holding that "[c]ourts should not undertake to dissect religious beliefs" and stating that the plaintiff "drew a line, and it [was] not for [the

Court] to say that the line he drew was an unreasonable one." *Id.* at 715.

In holding that courts may not define or question an individual's sincere religious beliefs, the Court in *Thomas* did not suggest that the courts must accept an individual's contention that a burden on his religious exercise is sufficiently substantial to entitle him to relief. Such a rule would mean that a plaintiff could easily circumvent *Allen* and *Tilton* by contending that the required payment of taxes, some portion of which goes to religious exercise with which the taxpayer disagrees, substantially burdens the taxpayer's own religious exercise.

Respondents' reading of *Thomas* is further undermined by *Bowen* v. *Roy*, 476 U.S. 693 (1986), and *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989), both of which were decided after *Thomas*. In *Roy*, the Court rejected a parent's Free Exercise Clause challenge to the government's internal use of his child's Social Security number, holding that the government's internal conduct "[did] not itself in any degree impair [the parent's] 'freedom to believe, express, and exercise' his religion." 476 U.S. at 700-701. The Court acknowledged that the parent's "religious views may not accept this distinction between individual and governmental conduct." *Id.* at 701 n.6. But rather than holding that the Court was likewise required to elide this distinction because the parent's religious beliefs did, the Court held that, "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Ibid.*

In *Hernandez*, the Court rejected a free-exercise challenge to the Internal Revenue Service's determi-

nation that taxpayers could not "deduct as charitable contributions payments made to branch churches of the Church of Scientology" in order to receive certain services. 490 U.S. at 684; see *id.* at 698-700. The Court, citing *Thomas*, noted that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 699. The Court, however, carefully distinguished that prohibited subject matter from the separate and permissible inquiry into "whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." *Ibid.* The Court ultimately found it unnecessary to decide that separate question, but only after explaining its "doubts" on that score because of the indirect nature of the asserted burden. *Ibid.*

Under these precedents, it is for the Court to decide whether the claimed burden on respondents' religious exercise qualifies as substantial for purposes of RFRA. For the reasons given above, it does not.

IV. RESPONDENTS' CLAIMS WOULD FAIL EVEN IF THE CONTRACEPTIVE-COVERAGE PROVISION WERE SUBJECT TO RFRA'S COMPELLING-INTEREST TEST

The corporate-respondents would not be exempt from the contraceptive-coverage provision even if it were subject to the compelling-interest test under RFRA. See 42 U.S.C. 2000bb-1(b). The contraceptive-coverage provision advances compelling governmental interests and is the least restrictive means to achieve them.

A. The Contraceptive-Coverage Provision Advances Compelling Governmental Interests

1. Protection of rights of corporate-respondents' employees in a comprehensive insurance system

a. The Affordable Care Act and its preventive-services coverage provision advance the compelling interest in ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. Individualized religion-based exemptions to that system would directly and materially harm the very individuals the scheme was intended to benefit—including the more than 13,000 employees of Hobby Lobby and Mardel and their covered family members.

Congress provided those plan participants and beneficiaries a privately-enforceable right to coverage of recommended preventive services without cost sharing. RFRA relief for respondents would extinguish that right, and potentially limit the freedoms of these individuals, who would be required to pay for these services out of pocket or go without them if they could not afford to pay.[8] The government is thus able to show that "the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant" before the court, *O Centro*, 546 U.S. at 430-431. The corporations the Greens own employ individuals whom the requested exemption will tangibly harm.

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[8] The cost of an IUD (including required medical examination, insertion, and follow-up visits) is between $500 and $1000. See Planned Parenthood, *IUD: Where Can I Get an IUD? How Much Does an IUD Cost?*, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited Jan. 3, 2014).

The court of appeals believed that the interests of corporate-respondents' employees are entitled to no weight under RFRA, opining that "[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere." Pet. App. 60a-61a. But this Court has never permitted a secular employer to obtain a religious accommodation that comes at the expense of employees.[9] In *Lee*, for example, the Court emphasized that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," 455 U.S. at 261, who would lose the Social Security benefits to which they were entitled by federal law. The Court held that the Free Exercise Clause did not require such an outcome, emphasizing that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Ibid.*

Congress likewise safeguarded the interests of employees when it amended the Social Security Act after *Lee* to respond to that decision. See Technical and

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[9] Indeed, the Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. Compare *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-711 (1985) (holding that statute requiring employers to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause), with *Amos*, 483 U.S. at 334-340 (concluding that Title VII's exemption for religious employers from its prohibition on religious discrimination does not violate the Establishment Clause as applied to non-profit activities of a church).

Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8007(a), 102 Stat. 3781; Miscellaneous and Technical Social Security Act Amendments of 1989, Pub. L. No. 101-239, Tit. X, § 10204(b), 103 Stat. 2474; see also 26 U.S.C. 3127. The amended statute permits Amish sole proprietors and partnerships (but *not* Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes *only* for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U.S.C. 3127(a)(2) and (b)(1) (cross-referencing waiver provision in 26 U.S.C. 1402(g)(1)(B)). Thus, employers with sincere religious beliefs have no right to a religiously-based exemption that would deprive employees of Social Security benefits without the employee's consent—an exemption analogous to the one respondents seek here.

Both of the free-exercise decisions cited in RFRA itself, see 42 U.S.C. 2000bb(b)(1), also emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert*, the Court accepted the free-exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." 374 U.S. at 409. In *Yoder*, the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was only a "minimal difference between what the State would require and what the Amish already accept." 406 U.S. at 235-236; see *id.* at

222. The Court in *Yoder* also emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. See *id.* at 231-232.[10]

Given that Congress intended RFRA to reflect the approach of these pre-*Smith* cases, see p. 16, *supra*, RFRA cannot properly be interpreted to require relief that would impose burdens on private third parties, such as those imposed here on corporate-respondents' 13,000 employees and their covered family members. The Court in *Cutter* has already so held in rejecting an Establishment Clause challenge to RLUIPA, which was modeled on RFRA and includes the same substantial-burden and compelling-interest tests. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 719-726 (2005); see also *O Centro*, 546 U.S. at 436. The Court in *Cutter* held that RLUIPA did not "founder on shoals [the Court's] prior decisions have identified"

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[10] The understanding of the free exercise of religion as not extending to actions that burden third parties is consistent with the views of the founding generation. See *Braunfeld*, 366 U.S. at 604 (plurality opinion) (noting Thomas Jefferson's view that the First Amendment's Religion Clauses "restored to man all his natural rights" but "no natural right in opposition to his social duties") (emphasis omitted) (quoting Letter from Thomas Jefferson to Comm. of the Danbury Baptist Ass'n (Jan. 1, 1802), in 8 *The Writings of Thomas Jefferson* 113 (H.A. Washington ed. 1854)); Thomas Jefferson, *Notes on the State of Virginia* 159 (William Peden ed. 1955) ("[I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.") (endnote omitted); Letter from James Madison to Edward Livingston (July 10, 1822), in 3 *Letters and Other Writings of James Madison*, at 274 (1865) ("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.").

because, "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" 544 U.S. at 720; see *id.* at 722 ("[A]n accommodation must be measured so that it does not override other significant interests.").

b. The importance of protected employee interests is further established in this context by the preventive-services coverage provision's status as, among other things, an amendment to the comprehensive employee-benefit scheme of ERISA. See 29 U.S.C. 1185d (Supp. V 2011). "While [RFRA] adopts a 'compelling governmental interest' standard, '[c]ontext matters in the application of that standard." *Cutter*, 544 U.S. at 722-723 (citation omitted; brackets in original). Part of that context here is ERISA, "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In enacting ERISA, Congress found "that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans," which "are affected with a national public interest." 29 U.S.C. 1001(a). Congress "declared" that ERISA's "policy" was in part to "protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b).

ERISA allocates rights and responsibilities among private parties (employers, group health plans, and employees), not just between the government and those parties. The preventive-services coverage provision establishes rights that ERISA plan participants and beneficiaries may enforce against group health

plans without any involvement by the government. See 29 U.S.C. 1132(a)(3) ("civil action may be brought * * * by a participant [or] beneficiary * * * to enjoin any act or practice which violates any provision of [ERISA]" or "to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of [ERISA]"); see also 29 U.S.C. 1132(a)(1)(B) and (5); 29 U.S.C. 1001(b) (stating that a "policy" of ERISA is to provide participants and beneficiaries "appropriate remedies, sanctions, and ready access to the Federal courts").

RFRA's purpose was "only to overturn the Supreme Court's decision in *Smith*" and not to "unsettle other areas of law." Senate Report 12. There is no reason to conclude that Congress intended to disrupt the ordering of private rights and responsibilities between employer and employee (and between an ERISA plan and its participants and beneficiaries) under ERISA by allowing RFRA to be used to impose a patchwork of exceptions to those private obligations and deprive participants and beneficiaries of statutorily-guaranteed benefits.

The incompatibility between ERISA's privately-enforceable employee benefit scheme and respondents' demand for a religiously-based exemption is further underscored by the serious question as to whether RFRA applies in litigation between private parties. The majority of courts of appeals to address that question have held that it does not, relying principally on the RFRA provision stating that an individual "whose religious exercise has been burdened" in violation of RFRA may "obtain appropriate relief against *a government*," 42 U.S.C. 2000bb-1(c) (emphasis added), rather than a private party, and the provi-

sions stating that the compelling-interest provision requires the "*[g]overnment*," not a private party, to come "forward with the evidence," 42 U.S.C. 2000bb-1(b) (emphasis added), 2000bb-2(3). See *General Conference Corp. of Seventh-day Adventists* v. *McGill*, 617 F.3d 402, 409-412 (6th Cir. 2010), cert. denied, 131 S. Ct. 2097 (2011); *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-843 (9th Cir. 1999).[11]

In *Korte* v. *Sebelius*, 735 F.3d 654 (2013), the Seventh Circuit directed entry of preliminary injunctions barring the government from enforcing the contraceptive-coverage provision against the for-profit corporations involved in that case. See *id.* at 687. Yet, if an employee of one of those corporations sued one of the corporations' group health plans for its failure to provide recommended contraceptive coverage, as she would be entitled to do under ERISA, see, *e.g.*, 29 U.S.C. 1132(a)(1)(B) and (a)(3), that circuit's precedent would make RFRA irrelevant in that private-party action, see *Tomic*, 442 F.3d at 1042. The employee thus would presumably prevail on her ERISA claim against the plan, and she would be entitled to appropriate equitable relief directing provision of the benefit. The prospect of such an anomalous result flowing from use of RFRA to create exemptions to the regulation of privately-enforceable employee benefits

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[11] Over a dissent from then-Judge Sotomayor, the Second Circuit reached the opposite conclusion in *Hankins* v. *Lyght*, 441 F.3d 96, 103-104 (2006); cf. *id.* at 114-115 (Sotomayor, J., dissenting), but a subsequent opinion from that court expressed "doubts" that *Hankins* was correctly decided, see *Rweyemamu* v. *Cote*, 520 F.3d 198, 203 & n.2 (2008).

under ERISA is another reason for concluding that Congress could not have intended that result.

c. If respondents were to prevail here, myriad other religious objections by employers could provide bases for RFRA claims for exemptions from ERISA-required coverage (and other employee-protection statutes). In this "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606 (plurality opinion), employers might assert religious objections to coverage of "virtually all conventional medical treatments," including immunizations, blood transfusions, antidepressants, medications derived from pigs, and gene therapy. *Grote*, 708 F.3d at 866 (Rovner, J., dissenting); see Pet. App. 128a n.8 (Briscoe, C.J., dissenting in relevant part). The result would be a patchwork of unpredictably incomplete coverage for employees dictated by the religious beliefs of their employers' shareholders.

These are not the kind of "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law" and that the Court found misplaced in *O Centro*. 546 U.S. at 435-436. The Court made clear in *O Centro* that "the Government can demonstrate a compelling interest in uniform application of a *particular program* by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435 (emphasis added); see *id.* at 436. And it cited as an example *Lee*'s conclusion that "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax

system because tax payments were spent in a manner that violates their religious belief." *Id.* at 435 (quoting *Lee*, 455 U.S. at 258, 260). In this case, the "particular program"—a uniform set of privately-enforceable employee benefits under ERISA—would not function as Congress intended if it were subject to employer opt-outs of the kind sought by respondents. Cf. *Lee*, 455 U.S. at 259-260 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

2. Public health

The contraceptive-coverage provision directly and materially advances the public health, which is unquestionably a compelling governmental interest. *E.g.*, *Mead* v. *Holder*, 766 F. Supp. 2d 16, 43 (D.D.C.), aff'd *sub nom. Seven-Sky* v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 63 (2012). "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting). Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but rather a concrete and specific one, supported by a wealth of empirical evidence.

a. Use of contraceptives reduces the incidence of unintended pregnancies, which comprise nearly half of

all pregnancies in the United States. IOM Report 102-103. A woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care." 78 Fed. Reg. at 39,872; see IOM Report 103. A woman who does not know she is pregnant is also more likely to engage in "behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks." 78 Fed. Reg. at 39,872; see IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872; see IOM Report 103. And because contraceptives reduce the number of unintended pregnancies, they "reduce the number of women seeking abortions." 78 Fed. Reg. at 39,872.

b. Contraceptive use also "helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced." 78 Fed. Reg. at 39,872; see IOM Report 103. In particular, short intervals between pregnancies "have been associated with low birth weight, prematurity, and small-for-gestational age births." 78 Fed. Reg. at 39,872.

c. "[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension * * * and cyanotic heart disease, and for women with the Marfan Syndrome." IOM Report 103-104; see 78 Fed. Reg. at 39,872.

d. "[T]here are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy." 78 Fed. Reg. at 39,872. For example, contraceptives can prevent certain cancers, menstrual disorders, and pelvic pain. *Ibid.*; see IOM Report 107.

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Contraceptive services are a highly effective means of preventing unintended pregnancies. See IOM Report 104-107; see *id.* at 105 ("The failure rates of all FDA-approved methods in both U.S. and international populations have been well documented and are negligible with proper use."). They therefore directly and tangibly help women avoid the health problems for themselves and their children discussed above.

The court of appeals opined that the burden placed on Hobby Lobby employees by respondents' requested exemption would not be significant because they "ask only to be excused from covering four contraceptive methods out of twenty." Pet. App. 60a. But contraceptive methods are not interchangeable. "For women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated"; those women and their health-care providers thus need an array of options "so that an appropriate method can be selected for the individual." IOM Report 105; see 78 Fed. Reg. at 39,872. In addition, some contraceptive methods are more effective than others. For example, the IUD (one of the methods respondents seek to exclude from coverage) has a "failure rate[] of 1 percent or less in the first 12 months of use," significantly lower than that of some alternative methods. IOM Report 105. In addition, unlike some alternative methods, the copper IUD does not rely on hormones, which are sometimes associated with side effects such as high blood pressure, blood clots, heart attacks, or strokes. See *Birth Control Guide*. Accordingly, the Institute of Medicine recommended access to *all* FDA-approved contraceptive methods. IOM Report 10, 104-110.

Moreover, the court of appeals' reasoning is not confined to claims involving four contraceptives, as demonstrated concretely by its subsequent decision in *Newland* v. *Sebelius*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013), which affirmed a preliminary injunction that allows a for-profit corporation to exclude *all* forms of contraception from coverage under its group health plan. See *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012). The Seventh and D.C. Circuits likewise accepted RFRA claims asserted by plaintiffs who oppose all forms of contraceptive coverage. See *Korte*, 735 F.3d at 662-663; *Gilardi*, 733 F.3d at 1210. But see *Autocam*, 730 F.3d at 621 (rejecting such a claim involving all FDA-approved contraceptives).

3. Equal access for women to health-care services

The contraceptive-coverage provision also advances the government's related compelling interest in assuring that women have equal access to recommended health-care services. 78 Fed. Reg. at 39,872, 39,887; see *Roberts* v. *United States Jaycees*, 468 U.S. 609, 626 (1984) (discussing the fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and noting that "[a]ssuring women equal access to * * * goods, privileges, and advantages clearly furthers compelling state interests").

Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18.

"Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); see Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). These disproportionately high costs have a tangible impact: women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); see IOM Report 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families."). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

The court of appeals opined that the requested exemption for corporate-respondents would not frustrate the government's objectives because the exemption would "not prevent employees from using their own money to purchase the contraceptives at issue here." Pet. App. 60a. By this logic, there would be no basis for requiring a group health plan to cover any particular item or service; it is always the case that employees deprived of coverage could spend "their own" money instead. That reasoning is flatly at odds with Congress's objective to increase access to recommended preventive services by eliminating all associated out-of-pocket costs. And it ignores the fact

that women deprived of coverage may not be able to afford to pay for the relevant services on their own.

4. The government's compelling interests are not undermined by other features of the Act and its implementing regulations

The court of appeals stated that "the interest here cannot be compelling" because the contraceptive-coverage provision does not apply to exempted religious institutions, employers with grandfathered group health plans, and small employers. Pet. App. 58a; see *id.* at 61a. The court was mistaken.

a. The regulatory exemption for religious employers extends to "churches and other houses of worship" and their integrated auxiliaries. 78 Fed. Reg. at 39,874; see 45 C.F.R. 147.131(a).[12] As the Seventh Circuit explained, there is a long tradition of protecting the autonomy of a church through exemptions of this kind. See *Korte*, 735 F.3d at 677. The Religion

[12] The regulations also authorize an accommodation for certain religious non-profit organizations, see p. 7, *supra*, but, outside of the limited circumstances in which such an employer utilizes a "church plan" exempt from regulation under ERISA, see *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-cv-2611, 2013 WL 6839900, at *10, *13-*14 (D. Colo. Dec. 27, 2013), temporary injunction granted, No. 13A691, 2013 WL 6869391 (Dec. 31, 2013) (Sotomayor, J., in chambers), this accommodation ensures that employees will retain access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations. This accommodation for eligible organizations is itself subject to a number of RFRA challenges by objecting religious non-profit employers that seek a complete exemption. See, *e.g.*, *Little Sisters*, *supra*; *University of Notre Dame* v. *Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), injunction pending appeal denied, No. 13-3853 (7th Cir. Dec. 30, 2013).

Clauses of the First Amendment give "'special solicitude to the rights of religious organizations' *as* religious organizations, respecting their autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines as religious institutions." *Ibid.* (quoting *Hosanna-Tabor*, 132 S. Ct. at 706). In establishing the religious-employer exemption, the Departments explained that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and that those employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

It would be perverse to hold that the government's provision of a targeted religious exemption for churches and houses of worship eliminates the compelling interests in the underlying regulations, thus effectively extending the same exemption, through RFRA, to anyone else who wants it. Such a reading of RFRA would *discourage* the government from accommodating religion, the opposite of what Congress intended in enacting the statute.

Indeed, *Lee* rejected an accommodation claim on the ground that it would undermine the comprehensive and mandatory nature of Social Security, 455 U.S. at 258, even as it emphasized that Congress *had* provided religion-based exemptions for self-employed individuals, *id.* at 260-261. "Confining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *ibid.*, and Congress's

inclusion of such an exemption did not undermine the government's interest in enforcing the law outside the exemption's confines.

Likewise, Congress has exempted non-profit religious institutions from certain employment regulations. See p. 20, *supra*. These religious exemptions have never been extended to any entity operating in the "commercial, profit-making world." *Amos*, 483 U.S. at 337. Nor have they been invoked as a basis to require additional religion-based exemptions for for-profit entities.

b. The court of appeals also opined that the government's asserted interests "cannot be compelling" because of the Affordable Care Act's grandfathering provision. Pet. App. 58a; see 42 U.S.C. 18011 (Supp. V 2011), 45 C.F.R. 147.140(g). That provision has the effect of allowing a transition period for compliance with a number of the Act's requirements (not just the contraceptive-coverage and other preventive-services provisions) until a plan makes one or more specified changes, such as an increase in cost-sharing requirements above a certain threshold, a decrease in employer contributions beyond a certain threshold, or the elimination of certain benefits. The impact of this grandfathering provision is thus "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). Consistent with that purpose, the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 7, 196.

The compelling nature of an interest is not diminished merely because the government phases in a regulation advancing it in order to avoid undue disruption. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 746-748 (1984) (noting that "protection of reasonable reliance interests is * * * a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). Congress specified that various crucial Affordable Care Act provisions would not be immediately effective. For example, the minimum coverage provision, 26 U.S.C. 5000A, which this Court upheld in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2594-2598 (2012), as well as the guaranteed-issue and community-rating insurance market reforms at the heart of the Act, did not take effect until 2014, four years after enactment. *Id.* at 2580; see 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a) (Supp. V 2011) (guaranteed-issue provision); see also 42 U.S.C. 300gg(a)(1), 300gg-4(b) (Supp. V 2011) (community-rating provision). These post-2010 effective dates do not in any way call into question the compelling nature of the interests that these key provisions advance.

c. The court of appeals was wrong as a factual matter to suggest (Pet. App. 58a) that plans offered by employers with fewer than 50 employees are exempt from the preventive-services coverage provision. The provision applies without regard to the size of the employer, 42 U.S.C. 300gg-13 (Supp. V 2011), as the majority appeared to recognize elsewhere in its opinion, Pet. App. 13a. Employers with fewer than 50 full-time-equivalent employees are exempt from a *different* provision, 26 U.S.C. 4980H, which subjects certain

large employers to a tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. 4980H(c)(2)(A). But small employers that do provide coverage must comply with the preventive-services coverage provision. See *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). Small businesses offering group health coverage that does not comply with the provision are subject to all the statutory enforcement mechanisms. See p. 3 & n.2, *supra*.

By the court of appeals' logic, *none* of the Act's provisions regulating group health plans would be supported by a compelling interest, given that small employers face no penalty for failing to offer a plan in the first place. Yet federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes. For example, when Title VII was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees. See *Arbaugh* v. *Y&H Corp.*, 546 U.S 500, 505 n.2 (2006). Even now, those prohibitions do not apply to employers with fewer than 15 employees. See *id.* at 504-505. This exception for small employers does not call into question the government's compelling interests in eradicating employment discrimination. Similarly, the Social Security Act, 42 U.S.C. 301 *et seq.*, originally did not cover agricultural or domestic workers. See *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 584 (1937); see *Lee*, 455 U.S. at 258 n.7 (noting additional ways in which Social Security Act's coverage was "broadened" over the years). Yet those initial exemptions for large

categories of employees did not undermine the compelling interests underlying the statute.

The court of appeals' analysis on this question also overlooks the fact that Congress expected the employees of small businesses that choose not to offer group health coverage to receive the required preventive services coverage through other means. Such employees may obtain coverage on a health insurance exchange, and all policies offered on exchanges will provide contraceptive coverage without cost sharing. See 45 C.F.R. 147.130; see also 26 U.S.C. 36B (providing tax credits for eligible individuals for insurance purchased on exchanges); 26 U.S.C. 5000A (minimum coverage provision).

This case bears no resemblance to *Lukumi* and *O Centro*, on which the court of appeals relied when analyzing the preventive-service coverage provision's "exemptions." Pet. App. 58a-59a. In *Lukumi*, exemptions in the statute resulted in a "gerrymander," through which "few if any killings of animals [were] prohibited other than Santeria sacrifice." 508 U.S. at 536; see *id.* at 534 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."). And, in *O Centro*, the exemption from the Controlled Substances Act that was sought by 130 members of a Christian Spiritist sect for the sacramental use of hoasca was "essentially indistinguishable" from the exemption for the sacramental use of peyote that had already been granted to hundreds of thousands of members of Native American tribes. *Gilardi*, 733 F.3d F. 3d at 1241 (Edwards, J., concurring in part and dissenting in part); see *O Centro*, 546 U.S. at 433. Here, unlike in *Lukumi*, there is no sug-

gestion that the government has "targeted a specific religious group" (J.A. 59 (acknowledgement of respondents' counsel)), and, unlike in *O Centro*, the exemption that respondents seek is fundamentally different from the statutory and regulatory provisions to which they attempt to analogize it.

B. Respondents' Alternative Proposal Is Not A Less Restrictive Means

Respondents also contend that the government has a less restrictive means of advancing its interests, namely distributing contraceptives to Hobby Lobby and Mardel employees itself. See Resp. Cert. Br. 34-35. But RFRA's less-restrictive means test does not require *Congress* to create or expand federal programs.

In the Affordable Care Act generally, and in the preventive-services coverage provision in particular, Congress chose to build on the existing system of workplace-based health coverage and private insurance, rather than replace that system with a government-run one. Congress set certain minimum, privately-enforceable standards for those private plans in order to advance the statute's public-health and employee- and policy-holder-protection goals. The preventive-services coverage provision is the least restrictive means of doing so. That is especially true given that an objecting employer retains the option of choosing not to offer a group health plan at all (thus allowing its employees to obtain individual coverage on the insurance exchanges, where many will qualify for subsidies) and potentially being subject to a tax instead. See 26 U.S.C. 4980H; p. 8, *supra*.

Respondents' contention that the contraceptive-coverage provision is invalid because the government

could instead itself provide contraceptive services to corporate-respondents' employees is also impossible to reconcile with *Lee*. On their theory, the government itself should have financed Social Security benefits directly to Lee's employees, as a less restrictive alternative to requiring that Lee pay Social Security taxes. The Court did not find such a government-funded scheme to be a less restrictive alternative in *Lee*, and it should not do so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORYAND REGULATORY APPENDIX

1. 42 U.S.C. 300gg-13 (Supp. V 2011) provides:

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) 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;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guide-

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

lines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

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[2] So in original. The period probably should be a semicolon.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

2. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify bur-

dens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

3. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

4. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

5. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

6. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

7. 45 C.F.R. 147.130 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) 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 with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group

health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(*1*) The inculcation of religious values is the purpose of the organization.

(*2*) The organization primarily employs persons who share the religious tenets of the organization.

(*3*) The organization serves primarily persons who share the religious tenets of the organization.

(*4*) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) *Office visits*—(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office

visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) *Conclusion.* In this *Example 1*, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) *Facts.* Same facts as *Example 1*. As the result of the screening, the individual is diag-

nosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2*, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 3*, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in

paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 4*, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) *Out-of-network providers.* Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) *Reasonable medical management.* Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immuniza-

tion Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing*—(1) *In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) *Changes in recommendations or guidelines.* A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. *See* § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

8. 45 C.F.R. 147.131 provides:

Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers.* In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and oper-

ates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group

health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or

plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—insured group health plans and student health insurance coverage.* For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or reenrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for con-

traceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/ student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/ institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) *Reliance*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) *Application to student health insurance coverage.* The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

9. 29 C.F.R. 2590.715-2713 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) 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 with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits*—(i) If an item or service described in paragraph (a)(1) of this section is billed sep-

arately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) *Conclusion.* In this *Example 1*, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) *Facts.* Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2*, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 3*, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 4*, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) *Out-of-network providers.* Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) *Reasonable medical management.* Nothing prevents a plan or issuer from using reasonable medi-

cal management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing*—(1) *In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) *Changes in recommendations or guidelines.* A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation

or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of this section apply for plan years beginning on or after September 23, 2010. *See* § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

10. 29 C.F.R. 2590.715-2713A provides:

Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) *Contraceptive coverage—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and § 2590.715-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without impos-

ing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-

2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must

segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible or-

ganization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies

with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

11. 26 C.F.R. 54.9815-2713 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 54.9815-2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i)-(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits.* [Reserved]

(3) *Out-of-network providers.* [Reserved]

(4) *Reasonable medical management.* [Reserved]

(5) *Services not described.* [Reserved]

(b) *Timing.* [Reserved]

(c) *Recommendations not current.* [Reserved]

(d) *Effective/applicability date.* April 16, 2012.

12. 26 C.F.R. 54.9815-2713A provides:

Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certifica-

tion on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) *Contraceptive coverage—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and 26 CFR 54.9815-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or

beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such pay-

ments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage*—insured group health plans—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services* (i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third par-

ty administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans* (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

Health Resources and Services Administration, Department of Health and Human Services

Women's Preventive Services Guidelines

Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being

The Affordable Care Act—the health insurance reform legislation passed by Congress and signed into law by President Obama on March 23, 2010—helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for those services. Preventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services when they are delivered by a network provider.

Women's Preventive Services Guidelines Supported by the Health Resources and Services Administration

Under the Affordable Care Act, women's preventive health care—such as mammograms, screenings for cervical cancer, prenatal care, and other services—generally must be covered by health plans with no cost sharing. However, the law recognizes and HHS understands the need to take into account the unique health needs of women throughout their lifespan.

The HRSA-supported health plan coverage guidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible. HHS commissioned an

IOM study to review what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women. HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.

Health Resources and Services Administration Women's Preventive Services Guidelines

Non-grandfathered plans (plans or policies created or sold after March 23, 2010, or older plans or policies that have been changed in certain ways since that date) generally are required to provide coverage without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012.

Type of Preventive Service	HHS Guideline for Health Insurance Coverage	Frequency
Well-woman visits.	Well-woman preventive care visit annually for adult women to obtain the recommended preventive services that are age and developmentally	Annual, although HHS recognizes that several visits may be needed to obtain all necessary recommended preventive services, depend-

	appropriate, including preconception care and many services necessary for prenatal care. This well-woman visit should, where appropriate, include other preventive services listed in this set of guidelines, as well as others referenced in section 2713.	ing on a woman's health status, health needs, and other risk factors.* (see note)
Screening for gestational diabetes.	Screening for gestational diabetes.	In pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for pregnant women identified to be at high risk for diabetes.

Human papillomavirus testing.	High-risk human papillomavirus DNA testing in women with normal cytology results.	Screening should begin at 30 years of age and should occur no more frequently than every 3 years.
Counseling for sexually transmitted infections.	Counseling on sexually transmitted infections for all sexually active women.	Annual.
Counseling and screening for human immunedeficiency virus.	Counseling and screening for human immune-deficiency virus infection for all sexually active women.	Annual.
Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with	As prescribed.

	reproductive capacity.	
Breastfeeding support, supplies, and counseling.	Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment.	In conjunction with each birth.
Screening and counseling for interpersonal and domestic violence.	Screening and counseling for interpersonal and domestic violence.	

** Refer to guidance issued by the Center for Consumer Information and Insurance Oversight entitled Affordable Care Act Implementation FAQs, Set 12, Q10. In addition, refer to recommendations in the July 2011 IOM report entitled Clinical Preventive Services for Women: Closing the Gaps concerning distinct preventive services that may be obtained during a well-woman preventive services visit.*

*** The guidelines concerning contraceptive methods and counseling described above do not apply to women*

who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement. See Federal Register Notice: Coverage of Certain Preventive Services Under the Affordable Care Act (PDF - 327 KB)