No. 13-356

In the Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL., PETITIONERS

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, 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.

2. Whether the requirement that non-exempted, non-grandfathered group health plans include coverage of contraceptives violates the Free Exercise Clause of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 13-356

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL., PETITIONERS

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 724 F.3d 377. The opinion of the district court (Pet. App. 1b-45b) is reported at 917 F. Supp. 2d 394. An earlier decision of the court of appeals denying an injunction pending appeal is unreported but is available at 2013 WL 1277419.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2013. A petition for rehearing was denied on August 14, 2013 (Pet. App. 1c-2c). The petition for a writ of certiorari was filed on September 19, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Most Americans with private health coverage obtain it through an employment-based group health plan. Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & tbl. 1-1 (2008). The cost of such employment-based health coverage is typically covered by a combination of employer and employee contributions. *Id.* at 4.

The federal government heavily subsidizes group health plans[1] and has also established certain minimum coverage standards for them. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 42 U.S.C. 300gg-4 (Supp. II 1996); 26 U.S.C. 9811 (Supp. III 1997); 29 U.S.C. 1185 (Supp. II 1996). In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 42 U.S.C. 300gg-6 (Supp. IV 1998); 29 U.S.C. 1185b (Supp. IV 1998).

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[2] Congress provided for additional minimum standards for group health plans (and health insurers offering coverage in both the group and individual markets).

---

[1] 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 (2006 & Supp. V 2011). The aggregate federal tax subsidy for employment-based health coverage was nearly $242 billion in 2009. Office of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011*, Tbl. 16:1 & n.7 (2010).

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

a. As relevant here, 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 requirement).[3] "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." Institute of Medicine, *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

[3] This preventive-services coverage requirement 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.*, and, with respect to such plans, is subject to ERISA's enforcement mechanisms. 29 U.S.C. 1185d (Supp. V 2011). It is also enforceable through imposition of tax penalties on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834 (Supp. V 2011). With respect to health insurers in the individual and group markets, States may enforce the Act's insurance market reforms, including the preventive-services coverage requirement. 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 respect to such insurers, she conducts such enforcement herself and may impose civil 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). The Act's grandfathering provision has the effect of allowing certain existing plans to transition to providing coverage for recommended preventive services without cost sharing and to complying with some of the Act's other requirements. See pp. 18-19, *infra*.

on responding to acute problems and the urgent needs of patients than on prevention." *Id.* at 16-17. To address this problem, the Act requires coverage of preventive services without cost sharing in four categories.

First, group health plans must cover items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force (Task Force). 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011). The Task Force is composed of independent health-care professionals who "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community." 42 U.S.C. 299b-4(a) (Supp. V 2011). Services rated "A" or "B" are those for which the Task Force has the greatest certainty of a net benefit for patients. 75 Fed. Reg. 41,733 (July 19, 2010). The Task Force has awarded those ratings to more than 40 preventive services, including cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure. *Id.* at 41,741-41,744.

Second, the Act requires coverage of immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. 42 U.S.C. 300gg-13(a)(2) (Supp. V. 2011). The Committee has recommended routine vaccination to prevent a variety of vaccine-preventable diseases that occur in children and adults. 75 Fed. Reg. at 41,740, 41,745-41,752.

Third, the Act requires coverage of "evidence-informed preventive care and screenings" for infants, children, and adolescents as provided for in guidelines supported by the Health Resources and Services Ad-

ministration (HRSA), which is a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011). The relevant HRSA guidelines were developed "by multidisciplinary professionals in the relevant fields to provide a framework for improving children's health and reducing morbidity and mortality based on a review of the relevant evidence." 75 Fed. Reg. at 41,733. They include a schedule of examinations and screenings. *Id.* at 41,753-41,755.

Fourth, and as particularly relevant here, the Act requires coverage, "with respect to women, [of] such additional preventive care and screenings" (not covered by the Task Force's recommendations) "as provided for in comprehensive guidelines supported" by HRSA. 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision in response to a legislative record showing that "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; Pet. App. 4b-5b.

Because HRSA did not have relevant guidelines at the time of the Act's enactment, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8726 (Feb. 15,

2012); IOM Report 1. 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. *Department 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 its review of the evidence, the Institute then recommended a number 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 coverage for 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 visited Oct. 11, 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 have adverse health consequences for both mothers and newborn children. IOM Report 102-103 (discussing consequences, including inadequate prenatal care, higher incidence of depression during pregnancy, and increased likelihood of preterm birth and low birth weight). 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. The Institute also noted that greater use of contraceptives lowers abortion rates. *Id.* at 105. Finally, the Institute explained that "contraception is highly cost-effective," as the "direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002." *Id.* at 107.

HRSA adopted guidelines consistent with the Institute's recommendations, including a coverage requirement for all FDA-approved "contraceptive methods [and] sterilization procedures," as well as "patient education and counseling for all women with reproductive capacity," as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Oct. 11, 2013). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, 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 requirement).

b. The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as 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 establish certain religion-related accommodations for group health plans established or maintained by "eligible organization[s]." 45 C.F.R. 147.131(b). An accommodation is available to a non-profit religious organization that has religious objections to providing coverage for some or all contraceptive services. *Ibid.* If a non-profit religious organization is eligible for such an accommodation, the women who participate in its plan will have access to contraceptive coverage without cost sharing through an alternative mechanism established by the regulations. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

"Consistent with religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," the definition of an organization eligible for an accommodation "does not extend to for-profit organizations." 78 Fed. Reg. at 39,875. The Departments that issued the preventive-services cov-

erage regulations explained that they were "unaware of any court granting a religious exemption to a for-profit organization, and decline[d] to expand the definition of eligible organization to include for-profit organizations." *Ibid.*

3. Petitioners are a for-profit corporation—Conestoga Wood Specialties Corp.—and the corporation's controlling shareholders, who are five family members (collectively referred to here as the Hahns). Pet. App. 12a, 7b-8b.[4] Conestoga Wood manufactures wood cabinets and has 950 full-time employees. *Id.* at 12a, 32a. Employees of the corporation obtain health coverage through the Conestoga Wood group health plan. *Id.* at 9b.

"The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite)," Pet. App. 12a n.5, and they oppose certain contraceptives that may prevent implantation of a fertilized egg. *Id.* at 12a. In this suit, petitioners contend that the requirement that the Conestoga Wood group health plan cover all forms of FDA-approved contraceptives violates 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, petitioners contend that RFRA entitles the Conestoga Wood plan to an exemption from the contraceptive-coverage requirement because the Hahns object to being re-

---

[4] These five members of the Hahn family own 100% of the voting shares of Conestoga Wood's stock. Pet. App. 8b n.4. Additional, non-voting shares are held by other family members. *Ibid.*

quired to "pay for, facilitate, or otherwise support" certain contraceptives that may prevent implantation of a fertilized egg. C.A. App. 39 para. 3; see Pet. App. 12a; *id.* at 10b (the Hahns object to coverage of Plan B and Ella).[5] Respondents also contend that the contraceptive-coverage requirement violates the Free Exercise Clause of the First Amendment. *Id.* at 9a.

The district court denied petitioners' motion for a preliminary injunction, holding that neither the corporation nor the Hahns had established a likelihood of success on the merits of their claims. Pet. App. 1b-45b. The court concluded that "Conestoga cannot exercise religion within the meaning of the RFRA" (*id.* at 26b) and that any burden on the Hahns' religious exercise from Conestoga employees' independent decisions to use contraceptives was too indirect and attenuated to be "substantial" under RFRA (*id.* at 27b-38b). The court rejected petitioners' free-exercise claim on the ground that Conestoga does not exercise religion for purposes of the Free Exercise Clause (*id.* at 16b-22b) and, in the alternative, because the contraceptive-coverage requirement is a neutral regulation of general applicability (*id.* at 22b-24b (citing *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990))).

---

[5] Plan B, an emergency contraceptive, is a pill that "works mainly by stopping the release of an egg from the ovary" but "may also work by preventing fertilization of an egg * * * or by preventing attachment (implantation) to the womb (uterus)." *Birth Control Guide*. Ella, another emergency contraceptive, is a pill that "works mainly by stopping or delaying the ovaries from releasing an egg" but "may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation)." *Ibid.*

4. After denying an injunction pending appeal, see 2013 WL 1277419, the court of appeals affirmed the judgment of the district court. Pet. App. 1a-93a. The court concluded that Conestoga Wood, which is a "for-profit, secular corporation," is not a person engaged in the exercise of religion within the meaning of RFRA or the Free Exercise Clause. *Id.* at 14a; see *id.* at 14a-28a. The court explained that it was "not aware of any case preceding the commencement of litigation about the [contraceptive-coverage requirement] in which a for-profit, secular corporation was itself found to have free exercise rights." *Id.* at 19a. The court rejected petitioners' contention that, "because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion." *Id.* at 21a.

The court of appeals also rejected petitioners' invitation to disregard the corporate form by treating Conestoga Wood as if it were indistinguishable from the Hahns as individuals. Pet. App. 23a-27a. The court explained 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' the corporation." *Id.* at 26a (quoting *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001)). The court concluded that, "[a]s the Hahns have decided to utilize the corporate form, they cannot 'move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'" *Id.* at 28a-29a (citation omitted).[6]

---

[6] Because petitioners failed to demonstrate a likelihood of success on the merits of their claims, the court of appeals did not

Judge Jordan dissented. He concluded that "for-profit corporations like Conestoga" may assert religious exercise rights under RFRA and the Free Exercise Clause. Pet. App. 49a. Judge Jordan further concluded that, in analyzing petitioners' claims, it is appropriate to disregard the corporate form and treat Conestoga as "nothing more than the common vision of five individuals," *i.e.*, the Hahns. *Id.* at 60a.

Judge Jordan concluded that petitioners had established a likelihood of success on their RFRA and free-exercise claims. See Pet. App. 69a-89a. He further concluded that they had demonstrated irreparable harm and that the balance of equities and public interest justified a preliminary injunction. *Id.* at 89a-93a.

5. The court of appeals denied petitioners' request for rehearing en banc by a 7-5 vote. Pet. App. 2c.

DISCUSSION

Petitioners contend that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which they are otherwise entitled by federal law, based on the religious objections of the controlling shareholders. That question is an important one that has divided the courts of appeals, but the government's pending petition for a writ of certiorari in *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-354 (filed Sept. 19, 2013) (*Hobby Lobby*), is a better vehicle for resolving it. This petition should therefore be held pending disposition of that certiorari petition and, if the *Hobby Lobby* peti-

---

address the other factors that bear on the issuance of a preliminary injunction. Pet. App. 29a.

tion is granted, the Court's decision in that case. Petitioners' separate claim that the Free Exercise Clause of the First Amendment likewise entitles Conestoga Wood to an exemption from the contraceptive-coverage requirement does not implicate any circuit conflict and plainly fails under *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 879 (1990). Further review of petitioners' constitutional claim is thus not warranted.

1. For the reasons provided in the government's petition for a writ of certiorari in *Hobby Lobby* (at 16-32), petitioners' RFRA claim was properly rejected by the lower courts in this case. As the government further notes in the *Hobby Lobby* petition (at 32-35), the proper disposition of RFRA claims like petitioners' is a question of exceptional importance that has divided the courts of appeals. Compare Pet. App. 1a-93a and *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013), petition for cert. pending, No. 13-482 (filed Oct. 15, 2013), with *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), petition for cert. pending, No. 13-354 (filed Sept. 19, 2013).[7]

This Court's consideration of the RFRA question on which petitioners seek review is therefore warranted, but the government believes that *Hobby Lobby* is a

[7] The same question is also pending before other courts of appeals. *E.g.*, *Korte* v. *Sebelius*, No. 12-3841, and *Grote* v. *Sebelius*, No. 13-1077 (7th Cir. argued May 22, 2013); *Gilardi* v. *HHS*, No. 13-5069 (D.C. Cir. argued Sept. 24, 2013); *O'Brien* v. *U.S. Dep't of Health & Human Servs.*, No. 12-3357, and *Annex Med., Inc.* v. *Sebelius*, No. 13-1118 (8th Cir. oral argument scheduled for Oct. 24, 2013); *Beckwith Elec. Co.* v. *Secretary, U.S. Dep't of Health & Human Servs.*, appeal pending, No. 13-13879 (11th Cir. docketed Aug. 28, 2013).

better vehicle for its consideration. We therefore respectfully suggest that the Court grant that petition and hold the petition here pending the Court's decision in that case.

The court of appeals in this case rejected petitioners' RFRA claims based only on threshold defects. In particular, the court held that "for profit, secular corporations" such as Conestoga "cannot engage in religious exercise" for purposes of RFRA. Pet. App. 10a; see *id.* at 27a-28a. And the court rejected the Hahns' claim because the contraceptive-coverage requirement applies only to Conestoga and "does not impose any requirements" on the Hahns as individuals. *Id.* at 28a-29a. The court therefore had no occasion to address other elements of the cause of action, and its opinion thus presents a less complete basis for review than the Tenth Circuit's decision in *Hobby Lobby*.

For example, the Tenth Circuit squarely addressed (and rejected) the government's argument that, assuming Hobby Lobby were a person exercising religion for purposes of RFRA, there would be no "substantial burden" on its religious exercise because an "employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer." *Hobby Lobby*, 723 F.3d at 1137; see *id.* at 1137-1143; cf. *Hobby Lobby* Pet. at 26-27 (contending that court of appeals' substantial burden analysis was erroneous). By contrast, the court of appeals in this case did not address that question. Additionally, the court of appeals here had no occasion to answer the question whether, assuming Conestoga Wood were a person exercising religion for purposes of RFRA and that its religious exercise were

substantially burdened, its claim would nonetheless fail because the contraceptive-coverage requirement satisfies heightened scrutiny under RFRA. The Tenth Circuit, by contrast, squarely addressed the scrutiny question, holding that the government did not identify an adequate compelling interest and, assuming that it did, failed to show that the requirement was the least restrictive means of advancing any compelling interest. See *Hobby Lobby*, 723 F.3d at 1143-1144; cf. *Hobby Lobby* Pet. at 27-32 (contending that the Tenth Circuit's scrutiny analysis was erroneous). For these reasons, the more comprehensive opinion in *Hobby Lobby* is a preferable vehicle for review.

Petitioners observe (Pet. 34) that the court of appeals in this case "expressly reached and ruled against" the RFRA claims of both Conestoga Wood and the Hahns as the individual owners of the company. By contrast, the Tenth Circuit did not formally address the RFRA claims of the individual owners in that case. See *Hobby Lobby*, 723 F.3d at 1126 n.4. That distinction does not counsel in favor of plenary review here.

Four members of the eight-member en banc court in *Hobby Lobby* wrote separately to explain that they would rule in favor of the individual owners (at least in part) on their RFRA claims. See 723 F.3d at 1126 n.4; see also *id.* at 1152-1157 (Gorsuch, J., concurring); *id.* at 1184-1190 (Matheson, J., concurring in part and dissenting in part). Moreover, the government explains in its *Hobby Lobby* petition (at 23-24) that the court of appeals in that case had erroneously "disregard[ed] fundamental tenets of American corporate law" by "attribut[ing] the religious beliefs of [Hobby

Lobby's owners] to the corporate entities themselves." See *id* at 23-27. That argument, if accepted, would effectively dispose of the RFRA claims of the individual owners. Finally, the respondents in *Hobby Lobby* have argued that the individual owners' RFRA claims provide an alternative ground for affirmance in that case, see Br. for Resp. at 27-29, *Hobby Lobby Stores, Inc.*, *supra* (No. 13-354), and the government anticipates addressing that issue in its merits briefs in that case. The Court can thus consider the question of individual owners' RFRA rights in *Hobby Lobby* and need not grant this petition to do so.

Instead of holding this petition for *Hobby Lobby*, the Court could choose to grant both petitions and consolidate the cases. For the reasons described above, however, granting both petitions would provide no benefit to the Court. At the same time, consolidation would impose costs. In particular, granting both petitions and then consolidating the cases would needlessly complicate briefing and argument, especially given that the government is petitioner in *Hobby Lobby* but respondent here. Accordingly, the Court should hold this petition and then dispose of it as appropriate after the Court's decision regarding certiorari (and the merits if the petition is granted) in *Hobby Lobby*.

2. The second question presented—whether the contraceptive-coverage requirement violates the Free Exercise Clause of the First Amendment—does not warrant this Court's review. The court of appeals in this case is the only one to have addressed that constitutional claim, and there is thus no conflict in the

circuits on that issue.[8] Moreover, petitioners do not explain why adjudication of their free-exercise claim is necessary. If they prevail on their RFRA claim, they will obtain complete relief, making adjudication of their constitutional claim unnecessary. See *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (citing the "fundamental and longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them"). And petitioners fail to identify any scenario under which their RFRA claim would fail but their First Amendment claim would succeed.

Moreover, petitioners' constitutional claim lacks merit. The Free Exercise Clause is not implicated by laws that are neutral and generally applicable. See *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990). Even assuming *arguendo* that the contraceptive-coverage requirement burdens petitioners' exercise of religion, cf. Pet. App. 14a-27a, there would be no violation of the Free Exercise Clause because that burden is imposed by a neutral and generally applicable requirement. See, *e.g.*, *O'Brien* v. *U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1160-1162 (E.D. Mo. 2012), appeal pending, No. 12-3357 (8th Cir. oral argument scheduled for Oct. 24, 2013); *Korte* v. *U.S. Dep't of Health & Human Servs.* 912 F. Supp. 2d 735, 743-746 (S.D. Ill. 2012), appeal pending, No. 12-3841 (7th Cir. argued

---

[8] The court of appeals in *Hobby Lobby* "decline[d] * * * to reach the constitutional question of whether [the corporations] are likely to succeed on their Free Exercise claim." 723 F.3d at 1121 n.2. The plaintiffs in *Autocam Corp.* raised only their RFRA claim on appeal. See 2013 WL 5182544, at *1.

May 22, 2013); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 870 F. Supp. 2d 1278, 1288-1290 (W.D. Okla. 2012), rev'd on other grounds, 723 F.3d 1114 (10th Cir. 2013) (en banc); Pet. App. 22b-24b.

A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (*Lukumi*). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Id.* at 543. Both the Affordable Care Act's coverage requirement for recommended preventive-health services for women in general, and the contraceptive-coverage requirement in particular, were plainly established to improve women's access to recommended preventive services and to lessen the disparity between men's and women's health care costs. See *O'Brien*, 894 F. Supp. 2d at 1161. They were not enacted to target religious exercise.

Judge Jordan's contention in dissent (Pet. App. 88a) that the general applicability of the preventive-health services coverage requirement is undermined by the Act's grandfathering provision, 42 U.S.C. 18011 (Supp. V. 2011); see 45 C.F.R. 147.140, is based on a misunderstanding of the way that provision works. As discussed in our *Hobby Lobby* petition (at 30), the grandfathering provision is transitional in effect and is intended to minimize disruption to existing coverage as the Affordable Care Act is implemented. See Pet. App. 14b (district court's observation that "grandfathering is not really a permanent 'exemption,' but rather, over the long term, a transition in the marketplace") (citation omitted). Moreover, the

grandfathering provision applies to a variety of the Act's requirements, not just the preventive-services coverage requirement. See 42 U.S.C. 18011 (Supp. V 2011). Plans lose their grandfathered status when they make changes, such as increasing cost-sharing requirements, decreasing employer contributions, or eliminating certain benefits, beyond specific thresholds. See 45 C.F.R. 147.140(g).

In any event, the existence of grandfathering does not "undercut[] the neutral purpose or general applicability of the mandate" to cover recommended preventive-health services. *Korte*, 912 F. Supp. 2d at 744. The requirement to cover recommended preventive-health services applies to group health plans in general, and grandfathered status is available without any reference to religion. See *ibid.* ("Plaintiffs do not link the grandfathering mechanism to any sort of religious preference."); Pet. App. 23b.

Judge Jordan was likewise mistaken in stating that plans sponsored by employers with fewer than 50 full-time employees are exempt from the preventive-services coverage requirement. Pet. App. 88a-89a. That requirement applies without regard to the size of the employer. See 42 U.S.C. 300gg-13 (Supp. V 2011).[9] In any event, many federal statutes contain exemptions for small employers; it cannot be that the existence of such exemptions renders those laws other than

---

[9] As noted in our *Hobby Lobby* petition (at 30-31), businesses with fewer than 50 full-time-equivalent employees are not subject to a *different* provision, 26 U.S.C. 4980H (Supp. V 2011), which imposes tax liability on certain large employers that fail to offer full-time employees (and their dependents) adequate health coverage. 26 U.S.C. 4980H(c)(2)(A) (Supp. V 2011). This large-employer tax has nothing to do with religion.

"generally applicable" for purposes of the Free Exercise Clause.

Finally, the fact that the government has provided an exemption and accommodations for certain nonprofit religious entities, see pp. 8-9, *supra*, does not mean that the contraceptive-coverage requirement has "the unconstitutional object of targeting religious beliefs and practices," *City of Boerne* v. *Flores*, 521 U.S. 507, 529 (1997), or is otherwise "less than neutral," Pet. App. 88a-89a (Jordan, J., dissenting). To the contrary, "the religious employer exemption presents a strong argument in favor of neutrality, demonstrating that the 'object of the law' was not 'to infringe upon or restrict practices because of their religious motivation.'" *O'Brien*, 894 F. Supp. 2d at 1161 (quoting *Lukumi*, 508 U.S. at 533); see Pet. App. 24b. The religious-employer exemption "does not differentiate between religions, but applies equally to all denominations." *O'Brien*, 894 F. Supp. 2d at 1162. The second question presented by the petition is, accordingly, not worthy of review.

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending the disposition of the petition in *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-354, and then dispose of this petition as appropriate in light of the Court's decision in that case.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

OCTOBER 2013