No. 13-354

In the
Supreme Court of the United States

Kathleen Sebelius, Secretary of Health
and Human Services, et al.,
Petitioners,

v.

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

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

Amicus Curiae Brief of the American Civil Rights Union In Support of Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the rights of all Americans to religious liberty, regardless of political correctness.

STATEMENT OF THE CASE

Respondents David and Barbara Green, and their children Steve Green, Mart Green, and Darsee Lett, operate as family businesses Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores. App. 64a.

David Green founded Hobby Lobby in 1970, starting as a single arts and crafts store in Oklahoma City. Today, Hobby Lobby operates a nationwide chain of over 500 stores employing over 13,000 full-time workers. Mart Green founded Mardel in 1981 as a chain of Christian bookstores affiliated with Hobby Lobby. Today, Mardel operates 35 stores employing about 400 workers full time. Both Hobby Lobby and Mardel have always operated as closely held family business, organized as general corporations under Oklahoma law, and exclusively

controlled by the Green family respondents. App. 7a-8a, Verified Compl. ("VC"), ¶¶ 23, 24, 32-38.

The Greens have always operated their businesses based on religious principles. App. 8a. The Greens adopted as their official statement of purpose for Hobby Lobby their commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id.* Mardel primarily sells Christian books and related materials as "a faithbased company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." *Id.* The Greens each sign a Statement of Faith and a Trustee Commitment obligating them to conduct their businesses according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA 21a.

The Greens consequently rely on their faith to guide business decisions for their companies. App. 8a. The Greens close all their stores on Sundays, to allow all their employees a day of rest, in accordance with biblical teachings, even though that costs them millions of dollars a year. At Christmas and Easter each year, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." The Greens play Christian songs for their store music. They grant their employees cost-free access to chaplains, spiritual counseling, and religiously themed financial courses. They donate millions from Company profits provide every year to ministries. App. 8a; VC ¶¶ 39-43, 45, 47, 51.

The Greens also steer their businesses clear from activities that transgress their religious beliefs. For example, Hobby Lobby does not sell shot glasses to avoid promoting alcohol consumption. The Greens also declined an offer from a liquor store to take over one of their building leases, which cost them hundreds of thousands of dollars a year. The Greens also do not allow their trucks to "back-haul" beer, losing substantial profits by refusing offers from distributors. App. 8a; VC ¶44.

The Greens faith similarly affects the insurance they provide through the self-funded health plan that Hobby Lobby offers to its employees. Based on their religious faith, the Greens believe that human life begins at conception. Hobby Lobby's health plan, therefore, does not provide coverage for drugs that risk killing an embryo, which would make the Greens complicit in abortion. App. 50a-51a. That means that Hobby Lobby's employee health plan does not cover drugs such as RU-486, which can terminate a pregnancy by chemical poisoning of the baby in the womb. The health plan also excludes coverage for Plan B, Ella, and two types of intrauterine devices that can prevent an embryo from implanting in the womb, resulting in death of the embryo.

But the Patient Protection and Affordable Care Act ("ACA") requires employers to provide health insurance for their employees that covers preventive services without cost-sharing, which includes preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(1)-(4); Pet. 3-8. That includes well-woman visits, gestational diabetes screening, testing and counseling for certain sexually-transmitted diseases, and breastfeeding support, supplies,

and counseling. *See* Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Jan. 24, 2014) ("HRSA Guidelines"). That same regulation also requires Hobby Lobby's health plan to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with

reproductive capacity." HRSA Guidelines; *see also* 76

Fed. Reg. 46621, 46626 (Aug. 3, 2011). The Petitioner calls this "the contraceptive coverage requirement." Pet. 8.

That contraceptive coverage requirement includes precisely Plan B, Ella, and two intrauterine devices which the Petitioner conceded below may prevent a human embryo from implanting in the womb, resulting in death for the embryo. Pet 10 n.5 (the FDA *Birth Control Guide* explains that these drugs and devices may prevent "attachment" or "implantation" of an embryo "in the womb"); App. 10a.

The court of appeals below, therefore, based on the Petitioner's concession and the FDA's guidance, found "no material dispute" over how these drugs and devices function, App. 10a n.3, and given their beliefs, the Respondent Greens cannot cover them through their companies' health insurance plan without facilitating what they believe to be an abortion. App. 50a-51a. The Respondent Greens do not object to covering any of the sixteen other forms of FDA-approved contraceptives,[2] but

[2] Those sixteen methods include male and female condoms,

they cannot cover these four methods without violating their faith. App. 14a-15a.

But if the Respondent Greens do not comply with this contraceptive coverage requirement of the ACA, they will be subject to regulatory enforcement actions, severe fines, and lawsuits. 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1185d, 1132; *see also* Pet. 3 n.3 (noting enforcement mechanisms). If Hobby Lobby continued to provide health insurance that did not cover the four abortion inducing drugs or devices that violate the religious faith of the Greens, the fine imposed on the family owned company would be $100 per day for each "individual to whom such failure relates." 26 U.S.C. §4980D. With 13,000 Hobby Lobby employees, the total fine would be "at least $1.3 million per day, or almost $475 million per year." App. 15a.

Hobby Lobby could alternatively drop its employee health insurance altogether. In that case, it would be subject to penalties totaling $26 million per year. *Id.*; VC ¶ 144; 26 U.S.C. § 4980H. Plus it would be subject to the additional cost of otherwise compensating its employees

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diaphragms, sponges, cervical caps, spermicides, the pill, the mini-pill, the continuous-use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. *See* FDA *Birth Control Guide* (May 2013), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

sufficiently, without the health insurance they formerly received.

As a result of various exemptions, health insurance for tens of millions of Americans, about half of all workers covered by employer provided health insurance, is not subject to the contraceptive coverage requirement of the ACA. App. 58a; Appellees' Br. at 40 n.11; *see also, e.g., Beckwith Elec. Co.* v. *Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013).

These exemptions include "small employers" with fewer than 50 employees, who collectively employ over 34 million people, who the ACA does not require to offer health insurance at all. 26 U.S.C. §4980H(c)(2); WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* 1 ("*ACA Small Business*"), http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Jan. 24, 2014).

Secondly, "grandfathered" plans may indefinitely avoid the contraceptive-coverage requirement by not making certain changes after the ACA's effective date. *See* 42 U.S.C. § 18011 (a)(2) ("Preservation of right to maintain existing coverage"); App. 12a-13a. HHS has estimated that 34% of small employer and 55% of large employer plans would retain grandfathered status in 2013. *See id.* at 34552 Tbl. 3.

Thirdly, the ACA grants HHS authority to establish exemptions for health insurance plans "established or maintained by religious employers… with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A);

App. 11a. HHS used this authority to exempt "churches, their integrated auxiliaries, conventions

or associations of churches, and the exclusively

religious activities of any religious order." App. 11a-

12a. Other religious groups who object to insurance

on principle and members of "health care sharing

ministries" are exempt from the ACA by the statute, and therefore not subject to the contraceptive-coverage requirement. 26 U.S.C. § 5000A (d)(2)(A), (B), (ii).

Fourthly, HHS recently issued an "accommodation" for certain non-exempt religious organizations allowing them to make contraceptive payments through their insurer or plan administrator. Pet. 8 (citing 45 C.F.R. § 147.131(b);

78 Fed. Reg. 39870); App. 12a. This accommodation, however, "does not extend to for profit organizations." *Id.* at 39875.

Even though the Respondent Greens have long demonstrated by their conduct their sincere religious objections to financing and facilitating the provision of abortifacients, they do not qualify for any of these exemptions. Hobby Lobby employs far more workers than

the 50 employee maximum to qualify for the small business exemption. The Hobby Lobby health plan lost its grandfather exemption because of changes made before the contraceptive, abortifacient, coverage requirement was specified by regulation after adoption of the ACA. VC ¶59; App. 14a. As a for-profit business, Hobby Lobby does not qualify for the religious employer exemption or the accommodation. App. 13a-14a. None of the exemptions apply to the Greens in their ownership and operation of the Christian bookstore company Mardel for the same reasons.

Consequently, the Greens must either violate their faith by financing and facilitating coverage for the mandated abortifacients, or pay crippling fines that threaten their livelihood.

The Respondent Greens consequently sued under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 20000bb *et seq.*, which provides that the government "shall not substantially burden a person's religious exercise" unless that burden satisfies the legal standards of strict scrutiny, *id.* § 2000bb-1(a), (b). They also sued under the guarantee of religious freedom under the First Amendment, and under the procedural requirements of the Administrative Procedures Act. App. 15a-16a.

After Respondents were denied a preliminary injunction and emergency appellate relief, they were granted initial en banc review before an 8 judge panel of the Tenth Circuit. App. 15a-16a. On June 27, the Tenth Circuit en banc reversed the district court, and ruled for the Respondent Greens. *Id.* 5a-7a.

The Tenth Circuit en banc panel held unanimously ruled that Hobby Lobby and Mardel have Article III standing, and that their claims are not barred by the Anti-Injunction Act, 26 U.S.C. § 7421. App. 17a-18a, 18a-21a. The federal government Petitioner conceded both points. Pet. 12.

On the merits, a five-judge majority concluded that Hobby Lobby and Mardel had demonstrated a likelihood of success on their RFRA claims. Based on the Dictionary Act, which provides that "unless the context indicates otherwise," the word "person" in federal law "includes corporations…as well as individuals," 1 U.S.C. § 1; App. 24a, the majority ruled that "the plain language of the text [of RFRA] encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a. The Tenth Circuit majority added that coverage for Hobby Lobby and Mardel under RFRA was especially appropriate because the companies publicly "express themselves for religious purposes," are "closely held family businesses with an explicit Christian mission as defined in their governing principles," "ma[k]e business decisions according to [religious] standards," and (in Mardel's case) "directly serve a religious community." *Id.* 37a, 39a, 42a.

The Tenth Circuit En Banc majority easily found that the contraceptive abortifacient mandate did substantially burden Respondent's free exercise of religion under RFRA. *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); *United States* v. *Lee*, 455 U.S. 252, 257 (1982). In particular, because "[t]he government [Petitioner] d[id] not

dispute the corporations' sincerity," the court saw "no reason to question it either." *Id.* 50a-51a.

Finally, imposing this substantial burden on the Respondent Greens could not serve a compelling state interest, because the exemptions already granted to the contraceptive mandate were so broad, encompassing tens of millions of people. App. 58a; *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Moreover, the court found that the contraceptive coverage mandate fails the least restrictive means test in serving any state interest, because Respondents "ask only to be excused from covering four contraceptive methods out of twenty," and the government "does not articulate why accommodating such a limited request fundamentally frustrates its goals." App. 59a-60a.

SUMMARY OF ARGUMENT

The contraceptive coverage mandate violates the rights to Freedom of Religion of the Respondent Greens under RFRA.

This Court has long held that individuals have Free Exercise rights with respect to their for-profit businesses. And RFRA does not say that "when individuals

incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. In the court below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a.

It cannot be disputed that the contraceptive coverage mandate substantially burdens the free exercise of religion by the Respondent Greens, as recognized by the Tenth Circuit below. The religious exercise at issue is Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting'" the mandated contraceptives. App. 50a-51a. The court also found that the sincerity of Respondents' beliefs was undisputed. App. 51a.

The burden is indisputably substantial because the Respondent Greens are faced with the stark, coercive choice either to "compromise their religious beliefs," or pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes," plus the cost of compensating their employees for the loss of health benefits formerly part of their employee compensation.

But as the Tenth Circuit found, the government Petitioner has not demonstrated any compelling interest in imposing this substantial burden on the religious freedom of the Respondent Greens. The government Petitioner has made no showing how any compelling interest would be "adversely affected" by granting the limited four drug

exemption out of 20 to the contraceptive coverage mandate for the Respondent Greens that would remove the substantial burden on their religious liberty demonstrated in this case.

The contraceptive coverage mandate also fails strict scrutiny because the government Petitioner failed to show that the mandate is the least restrictive means of furthering any compelling interest.

The religious freedom of the companies Hobby Lobby and Mardel is also protected by RFRA. Congress enacted RFRA after more than a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. That is why

corporations have long been treated as "persons"

under the Equal Protection Clause, the Due Process

Clause and section 1983.

Similarly, corporations have long been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.

The religious liberty of these corporations is substantially burdened just as the religious liberty of the Respondent Greens discussed above. And the government Petitioner again has not met the strict scrutiny standards to justify this substantial burden on religious liberty.

The government Petitioner has failed to offer any compelling interest that would justify the particular substantial burden on religious liberty in this case. There is no showing of how allowing these two corporations exemptions from four of the 20 contraceptive drugs and devices required by the contraceptive coverage mandate would adversely affect any compelling interest. Nor is there any showing that the contraceptive coverage mandate is the least restrictive means of serving any such compelling interest.

ARGUMENT

I. THE CONTRACEPTIVE COVERAGE MANDATE VIOLATES THE RIGHTS TO FREEDOM OF RELIGION OF THE RESPONDENT GREENS UNDER RFRA.

This Court has long held that "*individuals* have Free Exercise rights with respect to their *for-profit businesses*." App. 35a-36a (citing *Lee*, 455 U.S. 252); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961)) (emphasis in original); *see also* App. 68a (Hartz, J., concurring) (noting that "the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion").

It would be illogical and self-contradictory to hold that "an individual operating for-profit retains Free Exercise protections but an individual who incorporates…does not, even though he engages in the exact same activities as

before." App. 38a. This Court long ago expressly rejected the contention that those who engage in commercial enterprise thereby nullify their constitutional rights. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement").

RFRA does not say that "when individuals incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. In the court below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a. (Hartz, J., concurring). Nor can it be said that an individual loses his right to exercise freedom of religion in his business enterprise when that enterprise earns a profit. That proposition "is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." App. 36a.

It cannot be disputed that the contraceptive coverage mandate substantially burdens the free exercise of religion by the Respondent Greens, as recognized by the Tenth Circuit below. The religious exercise at issue is Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting'" the mandated contraceptives. App. 50a-51a. The court also found that the sincerity of Respondents' beliefs was undisputed. App. 51a.

Finally, the burden is indisputably substantial because the Respondent Greens are faced with the stark, coercive choice either to "compromise their religious beliefs," or pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes," plus the cost of compensating their employees for the loss of health benefits formerly part of their employee compensation. App. 51a-52a. Since Hobby Lobby and the Mardel Christian bookstore chain are family owned and operated, it is the Respondent Greens who would bear these costs.

As the Tenth Circuit majority noted, the government Petitioner "did not [even] question the significance of [this] financial burden" below. App. 52a. Indeed, the government effectively conceded as much by exempting certain religious organizations from this very mandate. In finding the burden substantial, the Tenth Circuit below noted "the *intensity of the coercion* applied by the government to act contrary to [Respondents' religious] beliefs." App. 44a, 46a-50a (emphasis in original). *Thomas*,

450 U.S. at 717-18; *Lee*, 455 U.S. at 256-57.

Under RFRA, that finding of a substantial burden on religious free exercise imposes the legal burden on the government to meet the requirements of strict scrutiny. *O Centro*, 546 U.S. at 429 (explaining that "the burden [of strict scrutiny] is placed squarely on the [g]overnment by RFRA…including at the preliminary injunction stage," citing 42 U.S.C. § 2000bb-1(b), 2000bb-2(3)). The Tenth Circuit majority below found that the government did not meet this burden.

In particular, the Tenth Circuit found that the government Petitioner did not demonstrate any compelling interest in imposing the substantial burden on the religious freedom of the Respondent Greens. The Tenth Circuit found that the government articulated only "broadly formulated interests" in public health and gender equality, but "offer[ed] almost no justification for not 'granting specific exemptions to particular religious claimants.'" App. 57a-58a (quoting *O Centro*, 546 U.S. at 431). What is the compelling interest that justifies the government imposing the substantial burden on the religious liberty of the Respondent Greens? The government Petitioner has still not told us, at this late stage of this litigation.

As this Court ruled in *O Centro*, 546 U.S. at 430-31, RFRA requires the government to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the *particular claimant* whose sincere exercise of religion is being substantially burdened") (quoting 42 U.S.C. §2000bb-1(b)) (emphasis added). The government Petitioner has made no showing how any compelling interest would be "adversely affected" by granting the limited four drug exemption out of 20 to the contraceptive coverage mandate for the Respondent Greens that would remove the substantial burden on their religious liberty demonstrated in this case. That is yet another reason why the decision of the Tenth Circuit below in favor of Respondents should be affirmed.

The denial of any such limited exemption for the Respondent Greens is even more unjustifiable due to the

extensive exemptions from the contraceptive coverage mandate discussed above already granted to thousands of employers covering tens of millions of employees. Petitioner before this Court for the first time raises a new compelling interest in "ensuring a 'comprehensive insurance system with a variety of benefits available to all participants.'" Pet. 29 (quoting *Lee*, 455 U.S. at 258). But *Lee* involved a request by the Amish for an exemption from Social Security, in which "mandatory participation [was] indispensable to [the system's] fiscal vitality" and to its ability to function, as today's payroll taxes are used to finance today's promised retirement benefits. The contraceptive coverage mandate cannot possibly require such "mandatory participation" because it already expressly includes widespread exemptions.

The contraceptive coverage mandate also fails strict scrutiny because the government Petitioner failed to show that the mandate is the least restrictive means of furthering any compelling interest. In the court below, the government failed to explain why it could not increase contraceptive access and use by other possible means, such as through Title X of the Public Health Service Act, where the government spends hundreds of millions each year to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services." 42 C.F.R. § 59.5(a)(1); RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding."). *See also* 42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family").

The court in *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) noted such "analogous programs" and lack of proof that providing contraceptives through these pre-existing programs would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women," particularly to women who could not otherwise afford them), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). That alternative would not restrict the religious liberty of anybody.

II. THE CONTRACEPTIVE COVERAGE MANDATE VIOLATES THE RIGHTS TO FREEDOM OF RELIGION OF HOBBY LOBBY AND MARDEL UNDER RFRA.

The religious freedom of the companies Hobby Lobby and Mardel is also protected by RFRA. RFRA's plain text protects "a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a). The Dictionary Act provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise… the word[ ] 'person'…include[s] *corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (emphasis added). The Tenth Circuit below correctly noted that "we could end the matter here since the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a.

Moreover, Congress enacted RFRA after more than a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. This Court

said in *Monell* v. *Department of Social Services*, 436 U.S. 658, 687 (1978) "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of

constitutional and statutory analysis." That is why

corporations have long been treated as "persons"

under the Equal Protection Clause, the Due Process

Clause and section 1983. *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927); *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889); *Monell*, 436 U.S. at 687-88.

Similarly, corporations have long been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. *E.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Utils. Comm'n*, 447 U.S. 557, 566-68 (1980); *Hale*

v. *Henkel*, 201 U.S. 43, 76 (1906); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76-77 (1908); *Ross* v. *Bernhard*, 396 U.S. 531, 532-33 (1970); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001).

In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978), the Court explained that "[t]he proper question…is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that

the First Amendment was meant to protect." *See also Citizens United* v. *FEC*, 558 U.S. 310, 342-43 (2010) (explaining that "political speech does not lose First Amendment protection 'simply because its source is a corporation'")(quoting *Bellotti*, 435 U.S. at 784).

Just as whether "corporations have speech rights" is not the right question in freedom of speech cases, whether "corporations exercise religion" is not the right question in freedom of religion cases. The right question, as *Belloti* indicates, is whether the law at issue transgresses religious liberty that RFRA and the First Amendment protect. We agree with Respondents that in this case, the answer is clearly yes.

Indeed, "[i]t is beyond question that associations—not just individuals—have Free Exercise rights." App. 34a (citing *Roberts* v*. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). And, "[a]s should be obvious," the right of religious exercise extends to all manner of religious associations—"including those that incorporate." App. 35a (citing *Church of the Lukumi Babalu Aye, Inc.* v*. City of Hialeah*, 508 U.S. 520, 525 (1993); *Terrett* v*. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.).

The religious liberty of these corporations is substantially burdened just as the religious liberty of the Respondent Greens discussed above. These corporations must either violate the religious beliefs of their owners and operators, or pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes," plus the cost of

compensating their employees for the loss of health benefits formerly part of their employee compensation. App. 51a-52a.

And the government Petitioner again has not met the strict scrutiny standards to justify this substantial burden on religious liberty. The government Petitioner has failed to offer any compelling interest that would justify the particular substantial burden on religious liberty in this case. There is no showing of how allowing these two corporations exemptions from four of the 20 contraceptive drugs and devices required by the contraceptive coverage mandate would adversely affect any compelling interest. Nor is there any showing that the contraceptive coverage mandate is the least restrictive means of serving any such compelling interest.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should affirm the ruling of the court below.

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