Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*, *Petitioners,*
v.
HOBBY LOBBY STORES, INC., *et al.*, *Respondents.*

CONESTOGA WOOD SPECIALTIES CORP., *et al.*, *Petitioners,*
v.
KATHLEEN SEBELIUS, *et al., Respondents.*

On writs of certiorari to the
United States Courts of Appeals
for the Third and Tenth Circuits

BRIEF OF AMICI CURIAE SENATORS ORRIN G. HATCH, DANIEL R. COATS, THAD COCHRAN, MIKE CRAPO, CHARLES GRASSLEY, JAMES M. INHOFE, JOHN MCCAIN, MITCH MCCONNELL, ROB PORTMAN, PAT ROBERTS, & RICHARD SHELBY, AND REPRESENTATIVES BOB GOODLATTE, CHRIS SMITH, LAMAR SMITH, & FRANK WOLF IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD, *ET AL.*

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STATEMENT OF INTEREST

Amici are federal legislators who were part of the broad, bipartisan coalition that enacted the Religious Freedom Restoration Act of 1993 ("RFRA").[1] Amici designed and passed RFRA to establish one blanket default rule that would insulate religious liberty from the shifting fortunes of interest-group politics. Amici have an interest in vindicating RFRA's blanket protections against the government's attempt to carve out a category of protected religious exercise from the statute's deliberately sweeping coverage.

SUMMARY OF ARGUMENT

Through the Religious Freedom Restoration Act, Congress sought to curb government-imposed infringements on religious liberty by providing that "government shall not substantially burden a person's exercise of religion" unless it is able to meet one of the most demanding tests known to law. 42 U.S.C. § 2000bb-1(a)-(b). Although the government acknowledges, as it must, that the term "person"

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[1] Amici Curiae are current members of Congress who voted to enact RFRA in 1993, either as senators or as representatives. Pursuant to Rule 37.6, counsel for amici curiae state that this brief was not authored in whole or in part by counsel for a party, that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than amici curiae or their counsel made such a monetary contribution. Counsel for all parties have consented to the filing of this brief, and their written consents have been filed with the Court.

ordinarily encompasses corporations, companies, associations, and individuals, and does not dispute that certain non-profit corporations qualify for free exercise protection, the government nevertheless asserts that "[g]ranting the relief [Hobby Lobby and Conestoga Wood] seek for profit-making corporate entities engaged in commercial activity would expand the scope of RFRA far beyond anything Congress contemplated." (H.L. Gov't Br. at 12.) The government is wrong. Congress could have carved out such a category of unprotected "persons" in RFRA itself or in a later statute, but it did not. RFRA protects those engaged in commercial activity, such as hospitals and universities. And RFRA makes no distinction between those who engage in commercial activity in a non-profit corporate form or otherwise. The judicially created carve-out that the government advocates here is directly contrary to one of the primary reasons Congress enacted RFRA in the first place: to prevent those charged with implementing the law from picking and choosing whose exercise of religion is protected and whose is not. RFRA is a "super-statute" that cuts across the entire U.S. Code and applies a single, religion-protective principle for evaluating all actions of the federal government that substantially burden the exercise of religion. Congress can displace RFRA's protection through ordinary legislation; but Congress did not do so in the Patient Protection and Affordable Care Act. Unless and until Congress instructs otherwise, RFRA requires strict scrutiny any time the government substantially burdens any person's exercise of religion.

Although bound to formulate the HHS mandate in accordance with RFRA, the government ignored RFRA throughout the administrative process and began to attend to its requirements only in response to litigation and the pressures of public opinion. In taking this course, the government has not only violated RFRA but has also undermined its central purpose of insulating the free exercise of religion from the forces of standard interest-group politics. RFRA is more than a liability rule. It is a statutory requirement that agencies must account for and affirmatively implement when regulating and not just when defensively litigating.

Rather than follow RFRA's requirement of a single standard for all "persons," the government has erected a three-tiered approach to religious objections rooted in a combination of state policies and political compromise. This approach offers protection to some corporations while leaving others with none. Notwithstanding the government's arguments to the contrary, the government's carve-out of a category of "persons" from protection under RFRA is entirely improper under that law.

ARGUMENT

I. RFRA Is a Super-Statute that Protects the Free Exercise of Religion from Standard Interest-Group Politics

The Religious Freedom Restoration Act "is the most important congressional action with respect to religion since the First Congress proposed the First Amendment." Douglas Laycock & Oliver S. Thomas,

Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 243 (1994). It was produced by an "extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended . . . the various religious faiths . . . as well as those who champion the cause of civil liberties." *Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 13 (1991) (statement of Rep. Solarz, chief sponsor of H.R. 5377).

This bipartisan legislative coalition came together to provide heightened protection for the free exercise of religion in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4)-(5), § 2000bb(b)(1). *Smith* sent the question of religious exemptions generally back into the political process. But Congress reacted legislatively by restoring a general principle designed to take free exercise questions out of "the standard interest-group politics that affect our many decisions." *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797).

Congress's intent in passing RFRA can be seen in four concrete ways: (1) the statute's "super-statute" design to cut across other federal laws; (2) the statute's textual declaration of purpose; (3) the

statute's across-the-board protection for free exercise of religion; and (4) the statute's provision of a judicial backstop.

RFRA applies "to all Federal law, *and the implementation of that law*, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *See* 42 U.S.C. § 2000bb-3(a) (emphasis added). By virtue of this application to all law formulation and implementation, "RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. . . . [It] is thus a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253-54 (1995). Congress can set aside RFRA's application by ordinary legislation, but must make plain its intention to do so. *See* 42 U.S.C. § 2000bb-3(b).

The text of RFRA declares two statutory purposes. One is to provide heightened, across-the-board protection for the free exercise of religion: "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." 42 U.S.C. § 2000bb(b)(1). The other is to provide a judicial forum for the vindication of this legal protection by "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2).

These purposes are related but distinct. The "claim or defense" is one means of securing enforcement of the compelling interest test. But if the government implements RFRA properly, litigation is simply unnecessary.

The primary operative section of RFRA sets forth a general rule that provides the same level of protection to all religious groups and to all exercises of religion: "Government shall not substantially burden a person's exercise of religion . . . except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a). This rule applies to all levels of the federal government. *See* 42 U.S.C. § 2000bb-2(1) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States").

The single provision defining the exception to RFRA's general rule sets forth a strict two-part test: "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." 42 U.S.C. § 2000bb-1(b). In describing what the government must prove to come within this exception, RFRA defines "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). In sum, RFRA sets forth a single default rule that the government may not substantially burden a person's exercise of religion, and the *sole* exception is when the

government carries the burden of satisfying strict scrutiny.

The government cannot satisfy this exception by asserting "broadly formulated interests justifying the general applicability of government mandates." *Gonzales v. O Centro Espirita Beneficent União do Vegetal*, 546 U.S. 418, 431 (2006). Rather, the government must "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." *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).

The next subsection of RFRA provides for judicial relief against government violations. *See* 42 U.S.C. § 2000bb-1(c) ("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."). As the statute's findings indicate, this judicial backstop was an essential part of the statutory design. *See* 42 U.S.C. § 2000bb(b)(2).

Congress recognized, as did various witnesses who testified in hearings on RFRA, that government bureaucrats and agencies tend to discount the need for religion-based exemptions because they identify their own programs with the public interest. *See Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 29 (1991) (statement of Rev. Dean M. Kelley,

Counselor on Religious Liberty, National Council of Churches) ("[W]hen every branch of Government and every agency likes to think that it is, by definition, expressing the public interest, and the public interest in its most compelling level, there is need for a neutral referee to judge that claim against the private claims of religious liberty."); *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340-341 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("No government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated.").

II. The Government Has Ignored and Violated RFRA in Implementing the HHS Mandate

The government has known of religion-based objections to the HHS mandate from the beginning of the lengthy administrative process through which they have attempted to implement it. But the government ignored RFRA in formulating the narrow religious exemption at the outset and only attended to its requirements because of litigation and the reaction to public scrutiny. As a consequence, the government has erected a three-tiered approach to religious objectors that provides third-class treatment to those at the bottom of the government's invented hierarchy and violates RFRA's single religion-protective standard.

A. The Government Ignored RFRA by Modeling Its Narrow Exemption and Selective Accommodation on State Policies and Title VII Instead of RFRA

Nothing in the Patient Protection and Affordable Care Act excludes the implementation of the women's preventive health services coverage requirement from the Religious Freedom Restoration Act. RFRA therefore directly controls the government's exercise of its rulemaking authority to implement the women's preventive health services coverage requirement. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter."). Yet the government ignored RFRA in designing the mandate and began to address its requirements only in response to litigation and public opinion.

In August 2011, the government implemented the statutory women's preventive services coverage requirement by imposing the mandate with a narrow "religious employer" exemption. Specifically, the HRSA released guidelines requiring certain group health plans and health insurance issuers to cover all FDA-approved contraceptives for women.[2] The government promulgated interim final regulations

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[2] *See* Health Resources and Services Administration, Department of Health and Human Services, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (August 1, 2011), available at http://www.hrsa.gov/womensguidelines.

that authorized the HRSA "to exempt *certain* religious employers from the Guidelines where contraceptive services are concerned." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (emphasis added). But neither the HRSA guidelines nor the Interim Final Rule mentioned or purported to apply the Religious Freedom Restoration Act.

Instead of following RFRA's controlling statutory command that "[g]overnment shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a)—that is, *any* person's exercise of religion—the government's "religious employer" exemption addressed only "the unique relationship between a house of worship and its employees in ministerial positions." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). And rather than formulate this exemption from the federal contraceptives mandate in accordance with federal law (*i.e.*, RFRA), the government sought to "be consistent with the *policies of States* that require contraceptive services coverage." *Id.* (emphasis added). This focus was particularly inapt for determining the scope of a religious exemption given that RFRA is inapplicable against States and local governments under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

During the comment period, the government received 200,000 comments on the scope of the religious employer exemption, including comments about the Religious Freedom Restoration Act. On January 20, 2012, however, Secretary Sebelius announced that the government would not expand the exemption. And in February 2012, the

government issued regulations that "finalize, without change," the interim final regulations issued in August 2011. Final Rule, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

By February 2012, however, the 200,000 initial commenters were not the only ones riled by the HHS mandate. Even stalwart Democrats were "deeply divided over President Barack Obama's new rule that religious schools and hospitals must provide insurance for free birth control to their employees." Donna Cassata, *Obama birth control policy divides Democrats*, Associated Press, Feb. 9, 2012. On Friday, February 10, 2012, the President announced at a press conference that the government would attempt to accommodate other employers with religious objections. At the same time that the government finalized its narrow religious employer exemption, then, the government also stated its intention to develop an "accommodation" for some (but not all) "non-exempt" employers, and to provide a temporary enforcement safe harbor for these employers in the meantime. *Id*.

In describing the potential "accommodation," the government asserted that its "future rulemaking would be informed by the existing practices of some issuers and religious organizations in the 28 States where contraception coverage requirements already exist . . . ." 77 Fed. Reg. at 8728. The government also asserted—without explanation or analysis—that "this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to

be the least restrictive means to further a compelling government interest." 77 Fed. Reg. at 8729. But the government never explained the connection between its state-law models for the accommodation and the claim that the proposed accommodation would comply with RFRA. Such a connection is far from clear given that the states are not subject to RFRA. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

By failing to follow RFRA when considering the scope of religion-based exemptions from the contraceptives mandate, the government guaranteed that impassioned political considerations would take the place of reasoned legal consideration. That is exactly what RFRA proponents worried would happen in the absence of RFRA. *See Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797) ("Religion will be subject to the standard interest-group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading."). Testifying before the Senate Judiciary Committee at the invitation of *then-Senator Biden*, Professor Douglas Laycock stated that "[i]n a society where regulation is driven by interest groups, *Smith* means that churches will be embroiled in endless political battles with secular interest groups." *Religious Freedom Restoration Act: Hearing before the S. Comm. on the Judiciary*, 102d Cong. 63 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas). And that is exactly what has happened, as *Vice President Biden* has since

experienced firsthand. According to multiple press reports, the government's shifting policies stem from internal disputes—disputes that have pitted Vice President Biden against others in the Obama Administration. *See* Helene Cooper & Laurie Goodstein, *Obama Adjusts a Rule Covering Contraceptives*, N.Y. Times, Feb. 11, 2012, at A1. The President's promise that the government would propose an accommodation reportedly came about only after the Administration faced "rising anger from Catholic Democrats, liberal columnists and left-leaning religious leaders." *Id*.

These are precisely the "vicissitudes of political controversy" that Congress enacted RFRA to protect religious freedom from being subjected to. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). RFRA did this "by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions." *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas).

The President's promise of future consideration of an accommodation amounted to an admission that the government could not have satisfied RFRA's "least restrictive means" requirement as of that time. For RFRA states that "Government may substantially burden a person's exercise of religion only if it [*i.e.*, the Government] *demonstrates* that application of the burden"

complies with the compelling governmental interest and least restrictive means requirements. 42 U.S.C. § 2000bb-1(b) (emphasis added); *see also* 42 U.S.C. § 2000bb-2(3) ("[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."). The government could not have made this demonstration based on their actions as of February 2012.

The government *then* committed to consider an accommodation in the *future* because it had not adequately considered an accommodation in the *past*. Without having previously analyzed this potential accommodation, the government could not have "demonstrat[ed]" that the mandate that it had already chosen and finalized with a narrow religious employer exemption was "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2).

The government's refusal to address RFRA in any meaningful way (except when sued in federal court) is remarkable. But it is also consistent with the way the government has treated the law of religious freedom from the beginning of the HHS mandate. When questioned by RFRA sponsor Senator Hatch at a February 15, 2012, hearing, Secretary Sebelius testified that she never requested an analysis of religious freedom issues surrounding the HHS mandate from the Department of Justice. *The President's Budget for Fiscal Year 2013: Hearing before the S. Comm. on Finance*, 112th Cong. (Feb. 15, 2012) (statement of Kathleen Sebelius, Sec'y of Health & Human Servs.). And HHS ignored an October 2011 request from twenty-seven Senators for

"any analysis requested or obtained by HHS regarding these religious-liberty issues." *Id.* (statement of Sen. Orrin G. Hatch, ranking member, S. Comm. on Finance).

In March 2012, the government issued an Advance Notice of Proposed Rulemaking to "establish alternative ways to fulfill" the contraceptives mandate "when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services for religious reasons and is not exempt under the final regulations published February 15, 2012." 77 Fed. Reg. 16501, 16501 (Mar. 21, 2012). Although it was obviously issued in the shadow of RFRA litigation, the Advance Notice does not even mention RFRA.

On February 6, 2013, the government promulgated a Notice of Proposed Rulemaking that changed the definition of "exempt" religious employers and proposed an accommodation for certain other religious employers. 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013). This Notice also further subdivided employers with religious objections from two categories (exempt and non-exempt) into three categories (exempt, non-exempt but accommodated, and neither exempt nor accommodated). In distinguishing between those employers who are non-exempt but accommodated, on the one hand, and those employers who are neither exempt nor accommodated, on the other hand, the Notice makes no reference to RFRA. The Notice refers instead to "the exemption for religious organizations under Title VII of the Civil Rights Act of 1964." *Id.* at 8462.

Although this reference was at least to federal law (unlike the state-law models for the proposed "accommodation"), RFRA supplies the proper guide, not Title VII.

B. The Government's Refusal to Exempt Any "For Profit" Corporations Violates RFRA's Single Religion-Protective Standard

The government's refusal to apply RFRA throughout the administrative process has resulted in a mandate that violates RFRA and turns the law of religious freedom upside down. RFRA places a heavy burden on the government and protects religion by default. But the HHS mandate places a heavy burden on religion and protects the government by default. RFRA's statutory structure—a single rule with a single exception—reflects the principle that the government should apply the same protective standard to all exercises of religion, by all persons. This principle may seem uncontroversial in the abstract. But the government can have difficulty honoring this demand in specific circumstances. *See O Centro Espirita*, 546 U.S. at 436 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration . . . of exceptions to rules of general applicability."). The government's categorical refusal to exempt or accommodate Hobby Lobby, Conestoga Wood, and other "for-profit corporations" provides a case in point.

Congress did not limit RFRA's protections to individuals. Rather, Congress provided that "[g]overnment shall not substantially burden a *person's* exercise of religion," 42 U.S.C. § 2000bb-1(a) (emphasis added), employing a term that ordinarily encompasses "*corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (emphasis added). This was no mistake. The statute's reach was purposefully broad because a primary goal of the statute was to provide a single standard for the protection of all religious exercise.

In formulating RFRA, Congress heard testimony about the need for greater protection for the free exercise of religion by organizations as well as individuals. For example, Congress heard about the legal plight of St. Agnes Hospital of the City of Baltimore, Inc., a Roman Catholic teaching hospital that objected to providing its residents with clinical training in sterilization, abortion, or artificial contraception. *See, e.g.*, *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("[C]ases like *St. Agnes* depend on RFRA specifying that the compelling interest test is . . . not the watered down deference to every bureaucrat that some lower courts now apply.") (citing *St. Agnes Hospital of the City of Baltimore, Inc. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990)). It was not at all controversial that St. Agnes Hospital, which, like both Hobby Lobby and Conestoga Wood,

is a corporate entity engaged in commercial activity, would qualify for protection under RFRA.

Because it cannot argue that corporations are not "person[s]" under RFRA, the government seeks to carve out "profit-making corporate entities engaged in commercial activity" from RFRA's definition of "person[s]". (H.L. Gov't Br. at 12.) The government reasons that "[f]or-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.'" (*Id.* at 19 (quoting *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).) But this is a gross oversimplification of matters. Many non-profit corporations, including those that unquestionably qualify as "persons" under RFRA, such as hospitals and universities, earn substantial revenue through commercial activity. And, as this case plainly shows, profits are not necessarily the be-all-and-end-all for every "for-profit" corporation.

In attempting to justify its failure to respect religious objections to the HHS mandate asserted by for-profit corporations, the government notes that Congress has sometimes created "religion-based exemptions for employers," but has limited those exemptions to "churches and other religious non-profit institutions." (H.L. Gov't Br. at 20 (discussing Title VII of the Civil Rights Act of 1964).) This demonstrates that Congress can distinguish among various types of corporate "persons" when it wishes to do so. But contrary to the government's assertion, Title VII does not distinguish between for-profit and

not-for-profit employers. The pursuit of profit is but one factor among many in a legal test implementing the statutory Title VII exemption. *See Korte v. Sebelius*, 735 F.3d 654, 675 (7th Cir. 2013) (citing cases). Moreover, Congress drew no such distinction in RFRA, which applies broadly and generally, subject only to displacement by later enactments that relax its reach in specific areas. Congress plainly wrote RFRA to include corporations, and neither RFRA nor the PPACA excludes for-profit corporations.

Even though Congress did not provide for different treatment of for-profit and non-profit employers in either RFRA or the PPACA, the government has created a three-tier categorization of religiously objecting employers and has subjected for-profit corporations and their owners to third-class treatment in the lowest tier. This contravenes the design of RFRA. Congress knew that a healthy respect for religious freedom as exercised by a variety of actors would call for various government responses appropriate to the circumstances. But rather than attempt to formulate different principles to govern different categories of religious liberty claimants, Congress formulated a single principle and left it to government officials and courts to apply that same principle with sensitivity to different factual circumstances.

One particular episode from Congress's consideration of RFRA clarifies the broad scope of what Congress intended to accomplish by supplying a single standard to protect religious freedom for all. Near the end of legislative debate over RFRA, a

group of senators sought an amendment to provide a lower level of protection for prisoners. Both Democratic and Republican senators opposed what Senator Lieberman termed the "dramatic proposal" that there should be "two separate standards for the protection of religious freedoms: protections afforded citizens out of jail and protections afforded incarcerated citizens." 139 Cong. Rec. S14462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman); *see also id*. at S14465 (statement of Sen. Hatch) ("[T]his amendment sets a dangerous precedent for religious liberty. The real danger lies not so much in the exemption of prisoners, but in the choice we are making about exempting anyone from the principle of the free exercise of religion. Today we are asked only to exempt prisoners. Tomorrow, however, we will be asked to exempt others. . . . How far we will venture is a legitimate unanswered question."); *id.* at S14466 (statement of Sen. Danforth) ("Congress should not codify group exceptions to fundamental freedoms."); *id.* at S14467 (statement of Sen. Kennedy) ("As we vote today to restore the broad protection for religious freedom envisioned by the Framers of the Constitution, let us not deny this fundamental right to persons in prison.").

The Senate's rejection of this double-standard-for-prisoners amendment vindicated the one-rule-for-everybody principle reflected in RFRA's text and structure. The same Congress that refused to make a separate rule for prisoners and non-prisoners would not have created, and did not create, a separate rule for profit-seeking and non-profit corporations. Yet that is precisely what the government asks this Court to do. The government's relegation of for-profit

corporations to third-class status in its invented hierarchy of religious objectors is flat-out wrong.

CONCLUSION

Congress has commanded equal treatment of all under a religion-protective rule. The government may not pick and choose whose exercise of religion is protected under RFRA and whose is not. Amici respectfully ask the Court to guarantee to all the full protection that Congress provided in RFRA.

Respectfully submitted,

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