Nos. 13-354 and 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ET AL. IN SUPPORT OF THE GOVERNMENT

THOMAS W. UDE, JR.
Counsel of Record
CAMILLA B. TAYLOR
Lambda Legal Defense
and Education Fund, Inc.
120 Wall Street, 19th Fl.
New York, NY 10005
(212) 809-8585
tude@lambdalegal.org

JENNIFER C. PIZER
JOSHUA J. JOHNSON
Lambda Legal Defense
and Education Fund, Inc.
4221 Wilshire Blvd.,
Suite 280
Los Angeles, CA 90010
(213) 382-7600

Counsel for Amici Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

Other Authorities

INTERESTS OF *AMICI CURIAE*

Amici Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), GLMA: Health Professionals Advancing LGBT Equality ("GLMA"), and Pride at Work—AFL CIO (collectively, "*Amici*") are among the nation's leading nonprofit advocacy organizations working to protect and advance the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people. *Amici* submit this brief in support of Secretary Sebelius in both cases.[1]

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education and policy advocacy. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003) (Texas ban on same-sex adult intimacy was unconstitutional denial of liberty); *Taylor v. Rice,* 451 F.3d 898 (D.C. Cir. 2006) (affirming need for trial in challenge to U.S. Foreign Service's blanket exclusion of HIV-positive applicants).

Lambda Legal has participated in many cases involving assertions that neutral statutes, rules, or policies regulating employment or professional services infringed religious freedom. *See, e.g., Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (rejecting claim that counseling student's speech and

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

religious exercise rights warranted exemption from university's requirement that she counsel lesbian and gay clients per usual standards); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim that nondiscrimination statute infringed physician's speech and religious exercise rights). Lambda Legal also has challenged unequal employee compensation, including discriminatory restrictions on health insurance. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

GLMA is the largest and oldest association of LGBT and ally health professionals of all disciplines working to ensure equality in healthcare for LGBT patients and professionals, using the expertise of GLMA members in advocacy, professional education, patient education and referrals, and promotion of research. Founded in 1981 in part to advocate for policy and services to address what would become the HIV/AIDS epidemic, GLMA's mission has broadened to address the full range of health issues affecting LGBT people, including ensuring that healthcare providers are welcoming to LGBT individuals and their families, and are competent to address LGBT-specific health disparities.

Pride at Work is a nonprofit organization and a constituency group of the AFL-CIO (American Federation of Labor & Congress of Industrial Organizations). With a national headquarters and more than twenty state and local chapters, Pride at Work organizes mutual support between the Labor Movement and the LGBT community. Seeking full equality for LGBT workers, Pride at Work strives to make certain that the Labor Movement cherishes

diversity, openness, safety, and dignity of each individual within its commitment to social and economic justice. In the spirit of the union movement's historic motto, "An Injury to One is An Injury to All," Pride at Work opposes all forms of discrimination on the job and in our unions based on sex, gender identity and expression, sexual orientation, race, national or ethnic origin, age, disability, religion or political views.

Amici thus have expertise concerning the legal infirmities of and likely harms inflicted by claims that religious objections should exempt for-profit, secular businesses from federal requirements concerning employer-provided health coverage. Such arguments undermine equality guarantees and other religiously neutral regulations of the commercial sphere to the detriment of our society generally and, in particular, the vulnerable constituencies *Amici* serve. Conversely, rejection of those arguments will affirm core principles essential for maintaining harmony and equal opportunity in the public marketplace of our diverse nation.

Amici have drawn upon their considerable expertise concerning the issues in this case in preparing this brief in support of, and to complement, the arguments of Secretary Sebelius.

SUMMARY OF THE ARGUMENT

Amici submit this brief to explain why Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corporation (together, "the Companies") should not prevail on their claims under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). The rule they challenge –

the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13, a regulation requiring contraception (among other preventive services) to be included in employer-sponsored health coverage – does not substantially burden their religious exercise. *Amici* agree with the Secretary that the challenged regulation "serve[s] compelling interests in public health and gender equality" (Pet'rs' Br., Case No. 13-354, 15) – and, more specifically, the related individual interest in managing one's own reproductive functions and health. The Supreme Court has emphasized the compelling nature of this individual liberty interest, explaining that "our laws and traditions accord constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" because such matters, "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), quoting *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

This brief addresses three interrelated points to underscore the important differences between commercial businesses and religious entities – essential differences that the Companies urge the Court to disregard – and to explain the harmful potential consequences of vesting commercial enterprises with religious rights as the Companies propose.

First, the Companies are three corporations that sell arts and crafts supplies, books, or doors and cabinetry for profit. They are not associations

convened for religious or spiritual activities. (Pet'rs' Br., Case No. 13-354, p.8 ¶3; Pet'rs' Br., Case No. 13-356, p.4.) The corporate form chosen by each company's owners is for commercial enterprises that sell goods or services to the public to make money. Such corporate entities do not hold religious beliefs and do not engage in worship. A contrary conclusion would depart dramatically from established, fundamental distinctions between religious and commercial corporations reflected in our statutes and precedents. For example, unlike religious organizations, the Companies are prohibited from employment discrimination based on religion, and may not impose religious tenets upon employees.

Second, the religious exercise claims here must fail because the payment of money by a business for employee health insurance in compliance with a public health rule is not exercise of religion. Even if it were, the burden imposed by the regulation is not substantial. It is well-established that those choosing to enter commerce to make profit accept voluntarily the constraints on their commercial conduct imposed by laws regulating that business to protect others – even if an individual merchant believes that some conduct either required or protected by those regulations is religiously proscribed. Moreover, here, the corporations have only an indirect, attenuated connection to third party decisions with which the corporations' owners disagree on religious grounds, and the owners themselves do not have even an attenuated connection. Thus, even if the challenged regulation could incidentally burden religious rights of a for-profit, secular corporation (rights which do not exist), as a matter of law such burden could not be substantial.

Third, laws and regulations governing for-profit businesses often provide essential safeguards to prevent commercial activities from harming third parties. Here, the challenged regulation protects employees of large businesses like the Companies, who are entitled to their own beliefs about contraception, reproductive health, and related health decisions. The regulation ensures these employees access to insurance coverage and protects their private medical decisions without cost-shifting driven by their employers' personal religious commitments. This Court should reject the Companies' demands for exemption from rules that protect employees' ability to make for themselves "the most intimate and personal choices a person may make in a lifetime." *Casey*, 505 U.S. at 851. *See also Lawrence*, 539 U.S. at 578 (explaining that *Casey* confirmed that decisions concerning intimate adult relationships are a form of protected liberty for both married and unmarried persons, and those decisions are protected regardless of gender and sexual orientation).

It would work a radical, unfair shifting of burdens onto employees if secular, commercial enterprises were allowed to exclude particular medical care from the health plans provided to their employees via third parties based on the business owners' religious tenets. Of particular interest to *Amici* are laws protecting LGBT persons and those with HIV from discrimination in commercial contexts, including health care services. Claims for accommodation of secular employers' personal religious beliefs at the expense of their employees have been rejected consistently. Granting the Companies the exemption they seek would invite re-

litigation of these questions and open the door to increased use of religion to deny LGBT persons, those with HIV, and other vulnerable minorities equal compensation, health care access, and other equitable treatment in commercial interactions. This Court should not depart now from settled law rejecting the exemption requested here.

Accordingly, *Amici* urge the Court to find that for-profit corporations do not have religious exercise rights. Alternatively, *Amici* submit that, at a minimum, requiring health plans to include contraception coverage within basic preventive care services does not substantially burden any such rights. Based on any or all of these grounds, the challenges to the contraception coverage rule should be rejected.

ARGUMENT

I. FOR-PROFIT CORPORATIONS DO NOT EXERCISE RELIGION.

Many people, including owners of for-profit corporations, look to their religious beliefs for guidance during their daily lives, including when making business decisions. When these cases began, no court had held that for-profit corporations can exercise religion. *Amici* believe the Third Circuit took the proper course when it considered and rejected the idea that such corporations have free exercise rights. *See Conestoga Wood Specialties Corp. v. Sec'y of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013) (noting "a total absence of caselaw" "in which a for-profit, secular corporation was itself found to have free exercise rights"). The Circuit explained that "the law has long recognized the distinction between the owners of a corporation and the corporation itself"

(*Conestoga*, 724 F.3d. at 389), and that "the 'nature, history, and purpose' of the Free Exercise Clause [failed to] support the conclusion that for-profit, secular corporations are protected under this particular constitutional provision." *Id.* at 385.

True, a majority of the en banc Tenth Circuit concluded otherwise in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 2013 U.S. App. LEXIS 13316, 2013 WL 3216103 (10th Cir. 2013) (en banc). Respectfully, however, the Tenth Circuit majority framed the question incorrectly – asking "[w]hen did [these for-profit corporations] lose their Free Exercise rights?" 2013 U.S. App. LEXIS 13316, *51 n.12 – rather than whether the clause's nature, history, and purpose reveal that it protects such corporations in the first place. *Id.* (reversing district court's denial of injunction and remanding for consideration of harm to third parties and balance of equities).

By contrast, the Third Circuit appropriately focused on the purpose of the corporate form for enterprises created to pursue commerce and make profits, rather than to further religious or charitable goals. Today as much as ever, our multicultural society restrains for-profit employers from imposing religious constraints on employees, based, at least in part, on a shared respect for one another's right to hold different beliefs. By contrast, religious corporations often are accorded significant latitude, particularly in employment decisions, and often are permitted to behave differently from the ways our laws require people and corporations in commercial settings to interact.

For example, the religion clauses grant not-for-profit religious corporations unique authority to

make employment decisions for positions deemed "ministerial," without regard to federal antidiscrimination laws. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694, 710 (2012). *Hosanna-Tabor* expressly distinguishes the right to free exercise from freedom of association, explaining pointedly that "the text of the First Amendment itself . . . gives special solicitude [regarding free exercise] to the rights of religious organizations." *Id.* at 706.

That solicitude also exists in many statutes. For example, consider two court decisions involving health clubs, one operated by a not-for-profit religious organization; the other by a for-profit corporation. The religious organization was exempt from liability under Title VII for firing a janitor employed by its health club who did not conform to the organization's religious precepts. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987). By contrast, the for-profit health club was not exempt from liability under a state antidiscrimination law for refusing to hire and promote persons who did not conform to its owners' personal religious faith. *Minnesota ex rel. McClure v. Sports and Health Club, Inc.,* 370 N.W.2d 844 (Minn. 1985).

Indeed, it is beyond dispute that for-profit employers are not free to discriminate based on their owners' religious beliefs. *See, e.g., EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 804-13 (S.D. Ind. 2002) (rejecting religious exercise claims of for-profit employer charged with violating Title VII by discriminating against employees who did not conform to employer's religious beliefs); *State ex rel.*

Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 548 (Minn. App. 1986) (rejecting free exercise claim by for-profit employer who fired employee for unmarried cohabitation in employer-provided housing).

Moreover, although the Free Exercise Clause has been understood to insulate a *religious* corporation that engaged in "shunning" someone, *Paul v. Watchtower Bible and Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 876 (9th Cir. 1987), a for-profit corporation would not enjoy similar insulation from liability for religious discrimination if supervisors "shunned" an employee – even if acting in furtherance of their owners' religious beliefs. Indeed, this Court has explained, in an employment-related case that did not involve Title VII, that the First Amendment does not permit an unequivocal preference for those whose conduct is motivated by religious belief; instead, consideration must also be accorded to the interests of others, whether or not those other interests are religious, to maintain the balance the Establishment Clause requires. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (statute violated Establishment Clause by requiring employers to accommodate Sabbath observers without allowing consideration of the religious and other interests of the employer and other employees). *See also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (rejecting Establishment Clause challenge to statute because "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). *See generally* Frederick Mark Gedicks and Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harvard Civil Rights-Civil Liberties L. Rev. __

(Spring 2014) (forthcoming), available at http://ssrn.com/abstract=2328516.

It is clear that the Companies could not condition their female employees' employment on their agreement either to use contraception or to refrain from doing so; nor could they pressure women toward either decision with wage subsidies or penalties. *Cf. Int'l Union v. Johnson Controls*, 499 U.S. 187, 198-200 (1991) (limiting women's employment opportunities based on their fertility when imposing no such limits on men was unlawful sex discrimination). As in *Johnson Controls*, here, too:

> It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice for the woman as hers to make.

Id. at 211.

Nor, under Title VII, could the Companies discharge or punish an employee for exercising her right to make pregnancy-related decisions – including whether to have an abortion. *See, e.g., Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (reversing summary judgment for employer because evidence sufficed to support finding that employee was discharged for terminating her pregnancy); *Turic v. Holland Hospitality, Inc.,* 85 F.3d 1211, 1214 (6th Cir. 1996) (affirming finding that employer violated Title VII because employee's contemplated abortion "was a motivating factor for her discharge").

That the Companies may not lawfully impose a "no contraceptives" rule on its female employees makes two things evident: 1) the absence of any substantial burden imposed by the regulation ensuring employees' equal access to the insurance necessary to make their own contraception choices; and 2) the degree of intrusion into employee privacy and procreative decision-making that these employers seek.

As these examples from the Title VII context demonstrate, exempting for-profit businesses from regulation based on their owners' religious convictions would flout the principles embodied in constitutional precedents and statutory protections that balance freedom of one's religion with protections for others' religions in the marketplace. Indeed, concerning many health, safety, and nondiscrimination laws that protect others, allowing for-profit, secular corporations to claim exemptions based on their owners' religious convictions would negate those laws entirely.

II. THE CONTRACEPTION COVERAGE REQUIREMENT DOES NOT SUBSTANTIALLY BURDEN THE RELIGIOUS EXERCISE OF THOSE CHOOSING TO SEEK PROFIT IN BUSINESSES REGULATED TO PROTECT OTHERS.

Neither the free exercise clause nor RFRA requires that owners of for-profit companies or the companies themselves be permitted to impose on others, such as employees, the religious practices and constraints that the owners voluntarily assume for themselves. Under RFRA, the federal government

"shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling government interest. 42 U.S.C. § 2000bb-1(a), (b). Even if the Companies could exercise religion, the contraception coverage requirement does not burden that exercise, let alone burden it substantially. As the Supreme Court explained more than thirty years ago, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982).

In free exercise challenges to commercial regulations governing employers, courts consistently have rejected even religious employers' claims that regulatory schemes protecting employees substantially burdened the employer's religious exercise. For example, in *Donovan v. Tony and Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983), *aff'd* 471 U.S. 290 (1985), the court concluded that "enforcement of wage and hour provisions" against religious non-profits that employed convicts and recovering addicts in commercial businesses to further their rehabilitation "cannot possibly have any direct impact on [the employers'] freedom to worship and evangelize as they please." *Id.* Explaining that "there comes a time when secular endeavor must be recognized as such, and passes over the line separating it from the sacred functions of religious worship," and this "metamorphosis or transmogrification occurs when a religious organization turns from the things of God to the

things of Caesar," the court concluded that the employers' free exercise claim was "clearly without merit." *Id.* at 400, 403.

Similarly, in *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the court rejected a religious school's free exercise claim seeking exemption from minimum wage and equal pay requirements. The school argued that these requirements impaired its ability to determine matters of internal church governance "as well as those of faith and doctrine," including "its head-of-household practice," which "was based on a sincerely-held belief derived from the Bible," and which required payment of a salary supplement to male but not female teachers. *Id.* at 1397. The school's employees intervened to support the school, arguing that having their wages set by the government, rather than by church governors, would deprive them of blessings they would receive by allowing their Lord to supply their needs. *Id.* Nevertheless, the court concluded that "any burden [imposed by fair pay requirements] would be limited." *Id.* The "increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id.* at 1397-98.

More recently, the D.C. Circuit rejected a free exercise claim seeking exemption from the ACA's provisions in their entirety. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4, 9 (D.C. Cir. 2011) (affirming dismissal of RFRA claim because requiring purchase of health insurance contrary to belief that "insurance expresses skepticism in God's ability to provide" imposed only a de minimis burden on those religious

beliefs), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

These cases upholding regulation of employers – including religious non-profits – are consistent with precedent in other commercial contexts finding that generally applicable rules governing marketplace conduct impose only minimal burdens, if any cognizable burden at all, on commercial participants' religious exercise. For example, courts repeatedly have rejected individuals' assertions that religious beliefs should exempt them from generally applicable constraints on professional conduct when offering health services. Indeed, rather than requiring accommodation, courts consistently have held that an individual's religious objection to such constraints renders the individual unqualified to perform the job. *See, e.g., Bruff v. North Miss. Health Servs., Inc.,* 244 F.3d 495, 497-98 (5th Cir. 2001) (Title VII did not require employer to accommodate counselor-employee's request to be excused from counseling patients on subjects conflicting with her religious beliefs; in contrast to typical religious accommodation requests, the employee's refusal to counsel patients about non-marital relationships meant "she would not perform some aspects of the position itself"); *Knight v. Conn. Dep't. of Pub. Health,* 275 F.3d 156, 164-65 (2d Cir. 2001) (denying free exercise claims of two public employees whose religious speech at work impeded their ability to do the job according to professional standards that protect patients); *Berry v. Dep't of Social Servs.,* 447 F.3d 642 (9th Cir. 2006) (county agency entitled to prohibit employee from discussing religion with clients); *Moore v. Metro. Human Serv. Dist.,* Slip Copy, 2010 U.S. Dist. LEXIS 107997, 2010 WL 3982312 (E.D. La. Oct. 8, 2010)

(publicly-employed social worker not entitled to religious accommodation allowing her to engage in Christian counseling methods).

In a range of other commercial contexts, too, courts likewise have held that a decision to engage in for-profit activity necessarily accepts certain regulatory constraints, and that therefore any burden imposed by generally applicable marketplace regulations is insufficiently substantial to support a free exercise claim. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.,* 493 U.S. 378, 389-91 (1990) (under strict scrutiny test relevant to RFRA claims, generally applicable sales tax did not impose "constitutionally significant" burden on ministry's sale of religious material because such a tax is "no different from other generally applicable laws and regulations – such as health and safety regulations – to which [the ministry] must adhere," and "is not a tax on the right to disseminate religious information, ideas, or beliefs, *per se*; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California"); *Henderson v. Kennedy,* 253 F.3d 12 (D.C. Cir. 2001) (under RFRA, regulation banning T-shirt sales on National Mall did not substantially burden claimants' religious exercise, despite T-shirts' religious message); *Smith v. Fair Emp't and Hous. Comm'n,* 913 P.2d 909 (Cal. 1996) (under strict scrutiny, burden imposed by fair housing law on landlord with religious objection to unmarried tenants not substantial).

Moreover, the supposed burden alleged by the Companies is even more attenuated than the pay

equity requirement in *Shenandoah Baptist Church,* the requirement to purchase health insurance despite a belief that insurance conveys lack of trust in God's will in *Seven-Sky,* or the requirement to counsel patients concerning relationships considered sinful in *Bruff*. Those requirements demanded that complainants directly engage in conduct inconsistent with their religious beliefs. Here, the contraception coverage requirement does not force the Companies or their owners to use contraception, or even to be involved at all in evaluating options and prices for separate contraception coverage.[2] Instead, the requirement allows the corporations' employees to make decisions for themselves about their own contraceptive use based on recommendations of their medical professionals and the various approved options. Accordingly, the burden consists of – at most – paying for a group plan that includes coverage for many services chosen by others for inclusion, which may or may not be used by employees or their family members, based on private decisions (and health needs) in which the employer will neither be involved nor aware. Neither the Companies nor their owners can claim burdens on religious exercise, much less substantial burdens, merely because the Companies

---

[2] Indeed, as the Solicitor General explains, the ACA does not require the owners to purchase anything. Pet'rs' Br., Case No. 13-354, 26-28. For that reason, *Amici* believe the Third Circuit correctly held that the ACA "does not impose any requirement on [them] and, therefore, the contraception coverage rule does not violate their RFRA or their free exercise rights." *Conestoga*, 724 F.3d at 389. Not surprisingly, of the many cases challenging the contraception coverage rule, *Amici* are not aware of a single challenge by a natural person who personally employs more than 50 employees.

comply with a generally applicable regulatory scheme that makes possible the independent choices of other people.

Courts have recognized this principle in other contexts. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school voucher program did not violate Establishment Clause because parents' private choice to use a voucher broke the circuit between government and religion); *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (no Establishment Clause violation where individual decision-making interrupts connection between government funding and religious recipient); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986) (accord). The same principle – that intervening decisions by an independent actor disconnect the source of funding from the conduct eventually undertaken with the funding – has been recognized in other First Amendment contexts as well. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (concluding that, when government funded legal services to facilitate private speech, not to promote government's message, any connection between the government and the resulting legal advocacy was indirect and incidental). Even more squarely on point, courts have affirmed dismissal of free exercise challenges by those who, based on religious beliefs, objected to use of tax or student fee dollars to help pay for broad health insurance programs that included abortion coverage. *See, e.g., Tarsney v. O'Keefe*, 225 F.3d 929, 932 (8th Cir. 2000) (rejecting challenge by taxpayers who objected on religious grounds to use of tax dollars to pay for Medicaid recipients' medically necessary abortions); *Goehring v. Brophy*, 94 F.3d 1294, 1297 (9th Cir. 1996)

(rejecting public school students' RFRA and free exercise-based objections to university tuition fee used, in part, to subsidize school's health insurance program, which included abortion care), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997).

The Companies also have argued that the contraception coverage requirement requires them to endorse and encourage conduct contrary to their religious views. This argument, too, fails as a matter of law. Courts repeatedly have rejected assertions that compliance with generally applicable rules or regulations constitutes any form of expression, let alone encouragement of regulated conduct. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*"FAIR"*), the Court rejected a claim by law schools that the schools' compliance with a statutory mandate to facilitate military recruitment on campus would send a message of agreement with the military's recruitment policies. Compliance with that mandate was not expressive and sent no message at all, let alone a message "that law schools agree with any speech by recruiters." *Id. at* 65, (citing *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 88 (1980), which upheld a state law requiring shopping center owners to allow expressive activities by others on their property, explaining that the views of those engaging in expressive activities were unlikely to be identified with the owner, who remained free to disassociate himself from those views and was "not … being compelled to affirm [a] belief in any governmentally prescribed position or view"); *see also Catholic Charities of Sacramento v. Superior Court (Sacramento),* 85 P.3d 67, 89 (2004) ("[C]ompliance

with a law regulating health care benefits is not speech. The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them. … [S]imple obedience to a law … cannot reasonably be seen as a statement of support for the law or its purpose").

Furthermore, the contraception coverage requirement, as a matter of logic as well as law, does not "promote" use of contraception over childbearing any more than coverage for chiropractic care "promotes" that treatment option over spinal surgery, pain medication, or physical therapy for back pain. Instead of endorsing or promoting any particular choice of treatment for particular health conditions, inclusion of coverage for multiple care options simply allows employees to pursue wellness with medical guidance based on individual needs, past experiences, and their own life goals.

Consequently, even if for-profit corporations were permitted to bring a religious exercise claim based on their owners' or shareholders' religious objections, or if owners were permitted to bring one to protest their companies' regulatory obligations, the burden on free exercise rights posed by the contraception coverage requirement is simply too slight to trigger RFRA's protection. Compliance by for-profit businesses with a complex regulatory scheme governing an employer's compensation to employees cannot be considered a burden on the employer's free exercise as a matter of law. Just as "[t]here is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages" due to an employer's sincerely-held religious beliefs about

employee compensation, *see Donovan*, 722 F.3d at 402 n.21, there is no constitutional right, under the religion clauses, to line-item veto coverage for particular treatments out of comprehensive health insurance.

III. EXEMPTING FOR-PROFIT CORPORATIONS FROM THE CONTRACEPTION COVERAGE REQUIREMENT WOULD NEGATE SOUND, SETTLED PRECEDENTS REQUIRING COMMERCIAL ACTORS, EVEN IF RELIGIOUSLY MOTIVATED, TO RESPECT THIRD PARTIES' RIGHTS AND INTERESTS.

The Companies' argument, if accepted, would transform our society into one in which for-profit businesses generally could claim religious immunity from the full spectrum of generally applicable laws protecting people – including employees, consumers, and other members of the public. It is long settled that for-profit businesses cannot immunize themselves from laws protecting others from harm by asserting a religious motive for their conduct. *See, e.g., Estate of Thornton*, *supra*, 472 U.S. at 709; *Lee*, *supra*, 455 U.S. at 261. Thus, even when courts have found that a challenged regulation of commercial conduct *does* burden an individual's religious exercise, they nevertheless generally have upheld such regulations as serving governmental interests, including protection of those whose religious beliefs may differ from the challenger's, and who would be harmed if the challenger were exempted from the law. *See, e.g., Lee*, *supra*, 455 U.S. at 261.

Because *Lee* has striking parallels to the Companies' free exercise claims here, *Lee's* facts bear close examination. To begin with, though, note that the claimant in *Lee* had a stronger free exercise claim than the ones before the Court now because Mr. Lee was a self-employed farmer who also employed others, not a for-profit corporation. He asserted a free exercise exemption from responsibility to pay social security taxes for his employees because of his – and his employees' – religious beliefs that accepting social security benefits and paying social security taxes are sinful. This Court acknowledged a conflict between Mr. Lee's religious beliefs and his tax obligations, and that a statutory provision exempted him from the duty to pay such taxes for his own self-employment. *Id.* at 257. However, this Court determined that he nonetheless was required to pay social security taxes for his employees because "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.* at 261.

This Court's conclusion in *Lee* is the governing rule. Indeed, courts have considered religious exercise claims in diverse contexts and consistently have rejected such claims where accommodating one person's religious belief could harm others. As the Second Circuit has emphasized, courts frequently "have held that the state's interest outweighs any First Amendment rights" where there is a "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights." *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971), *citing*

Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (violation of child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (serious illness of a child). *See also, e.g., Keeton v. Anderson-Wiley*, 664 F.3d 865, 880 (11th Cir. 2011) (college not required to allow counseling student religious accommodation that would "evade the curricular requirement that she not impose her moral values on clients"); *Spratt v. Kent Cnty.,* 621 F. Supp. 594, 600-02 (D.C. Mich. 1985) (public employer justified in firing social worker for inclusion of religious practices while counseling inmates); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959, 967 (Cal. 2008) (under strict scrutiny, no religious exemption from nondiscrimination law for physicians objecting to treating lesbian patients).

Title VII applies an approach consistent with the free exercise principle requiring avoidance of harm to others. Thus, although many workers' religious beliefs inform their conduct, it is settled that there are limits to workers' freedom to act on their beliefs to the detriment of coworkers and business associates. *See, e.g., Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (supervisor wrongfully claimed a religious right to harass lesbian subordinate); *Bruff,* 244 F.3d at 497-98 (Title VII did not require employer to accommodate counselor-employee by excusing her from counseling patients concerning relationships to which she had religious objection);

Chalmers v. Tulon, 101 F.3d 1012, 1021 (4th Cir. 1996) (employee not entitled to send religiously motivated letters to co-workers criticizing their private lives).

Title VII likewise protects employees' religious liberty from burdens posed by an employer's insistence on conformity with a particular religious creed, and will not permit firing of an employee "simply because he did not hold the same religious beliefs as his supervisors." *Shapolia v. Los Alamos Nat'l. Lab.*, 992 F.2d 1033, 1037 (10th Cir. 1993). *See also, e.g., Noyes v. Kelly Servs.*, 488 F.3d 1163, 1166, 1168-69 (9th Cir. 2007) (evidence sufficient to proceed with plaintiff's claim that supervisor wrongfully denied her promotion because she was not part of his religious group); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) ("Venters need only show that her perceived religious shortcomings [her unwillingness to strive for salvation as Ives understood it, for example] played a motivating role in her discharge.").[3] Under this standard, Title VII protects employees against being fired or otherwise

---

[3] Lower federal court decisions applying this principle are legion. *See, e.g., Panchoosingh v. General Labor Staffing Servs., Inc.*, No. 07-80818-CI, 2009 WL 961148, *6 (S.D. Fla. Apr. 8, 2009); *Tillery v. ATSI, Inc.,* 242 F. Supp. 2d 1051, 1062-63 (N.D. Ala. 2003), *aff'd without opinion*, 97 Fed. Appx. 906 (Table) (11th Cir. 2004) (unpublished); *Backus v. Mena Newspapers, Inc.*, 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar v. Sears, Roebuck and Co.*, 965 F. Supp. 833, 837 (N.D. W.Va. 1997); *Yancey v. Nat'l Ctr. on Insts. and Alternatives*, 986 F. Supp. 945, 955 (D. Md. 1997); *Sarenpa v. Express Images Inc.*, Civ.04-1538(JRT/JSM), *3 (D. Minn. Dec. 1, 2005); *Kaminsky v. Saint Louis Univ. Sch. of Med.*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006).

punished for divorcing, having an extramarital affair, or otherwise "failing" to adhere generally to specified religious precepts.[4]

In the United States, differing religious beliefs about family life often have generated disputes not only in employment, but also in medical and other arenas. Prominent among them, in particular, have been problems arising when religious convictions prompt some to believe that others have sinned or should be kept apart, leading to discrimination in commercial settings. Although some forms of religiously motivated discrimination doubtless have receded, our history tells a recurring saga of successive generations asking anew whether our protections for religious liberty warrant exemptions from laws protecting others' liberty and right to participate equally in civic life. Our courts rightly and consistently have recognized that the answer to that question must remain the same: religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

Thus, for example, during the past century's struggles over racial integration, some Christian schools restricted admissions of African American applicants based on beliefs that "mixing of the races" would violate God's commands. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve African

---

[4] *See Kaminsky*, 2006 WL 2376232, *5 (divorce); *Sarenpa v. Express Images Inc.*, 2005 WL 3299455 at *3 (extramarital affair); *Henegar*, 965 F. Supp. at 834 (living with a man while divorcing her husband); *Noyes*, 488 F.3d at 1166, 1168-69 (failure to adhere generally to supervisor's religious beliefs); *Venters*, 123 F.3d at 972 (same).

American customers citing religious objections to "integration of the races." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Religious tenets also were used to justify laws and policies against interracial relationships and marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (in decision invalidating state interracial marriage ban, quoting trial judge's admonition that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

And as our society began coming to grips with the desire and need of women for equal treatment in the workplace, some who objected on religious grounds sought exemptions from employment non-discrimination laws as a free exercise right. Notwithstanding the longstanding religious traditions on which such claims often were premised, courts recognized that these religious views could not be accommodated in the workplace without vitiating the sex discrimination protections on which workers are entitled to depend. *See, e.g., EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (school violated antidiscrimination law by offering unequal health benefits to female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women bus

drivers due to religious objection of Hasidic male student bus riders).

Similarly, after state and local governments enacted fair housing laws that included protections for unmarried couples, landlords unsuccessfully sought exemptions based on their belief that they would sin by providing residences in which tenants would commit the sin of fornication. *See, e.g., Smith*, 913 P. 2d at 925 (rejecting religious exercise claim of landlord because housing law did not substantially burden religious exercise); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

Across generations, then, these questions have been asked and answered, echoing with reassuring consistency as courts have recognized the public's abiding interests in securing fair access and peaceful co-existence in the public marketplace. Today, these common interests are tested once against as LGBT people seek full participation in American life. There is growing understanding that sexual orientation and gender expression are personal characteristics bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family together. *United States v. Windsor*, 133 S.Ct. 2675, 2694-96 (2013); *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). And yet, there remain pervasive and fervent religious objections on the part of many people to interacting with LGBT people in commercial contexts, still inspiring widespread harassment and discrimination. *See, e.g., Bodett,* 366 F.3d at 736; *Peterson v. Hewlett-Packard Co.,* 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to provoke coworkers); *Knight,*

275 F.3d at 156 (visiting nurse proselytizing to home-bound AIDS patient); *Erdmann v. Tranquility, Inc.*, 155 F. Supp.2d 1152 (N.D. Cal. 2001) (supervisor harassment of gay subordinate with warnings he would "go to hell" and pressure to join workplace prayer services); *Hyman v. City of Louisville*, 132 F. Supp.2d 528, 539-540 (W.D. Ky. 2001) (physician refusal to employ gay people), *vacated on other grounds by* 53 Fed. Appx. 740 (6th Cir. 2002). As laws and company policies have begun to offer more protections against this discrimination, some who object on religious grounds are asking courts to change course and allow religious exemptions where they have not done so in past cases. For the most part, the past principle has held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g., Bodett,* 366 F.3d at 736 (rejecting religious accommodation claim)*; Peterson,* 358 F.3d at 599 (same); *Knight,* 275 F.3d at 156 (same); *Erdmann*, 155 F. Supp.2d at 1152 (antigay harassment was unlawful discrimination); *Hyman*, 132 F.Supp.2d at 539-540 (rejecting physician's claim of religious exemption from nondiscrimination law); *North Coast Women's Care Med. Gp.,* 189 P.3d at 970 (same).

The exemption the Companies seek here would mark a sea change – not only in allowing business owners' religious views about family planning to burden decisions employees are entitled to make for themselves, but also in opening the door to similar denials of equal compensation, health care access, and other equitable treatment for LGBT people, persons with HIV, and anyone else whose family life or health need diverges from their employers' religious convictions. As this Court has recognized,

our federal laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence,* 539 U.S. at 574, *citing Casey*, 505 U.S. at 851. The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.*¸ spotlights that the "person" whose autonomy is to be protected is the person herself – not the owner of the for-profit company that employs her.

Many employees, like many business owners, hold religious and other beliefs that guide their lives. Those beliefs remain with them when entering their shared place of business. As recognized in the decisions discussed above, permitting owners of for-profit companies to interject themselves into employees' home lives and decisions concerning fertility, birth control, and childbearing – which the Companies' arguments do – not only would encourage others to do the same, but would subvert compelling interests in autonomy, public health, and gender equity served by the rule the Companies resist. The Companies offer no limiting principle and, indeed, there is none. Religious critiques of contraception can as easily be leveled at sterilization, infertility care, and decisions between vaginal delivery and caesarian section. How does autonomy survive an employer's line-item veto of insurance coverage that pokes and prods personal decisions by shifting costs from health plan to worker?

Stepping back from the reproductive health context of these cases, imagine how our nation's workplace standards would be transformed were this

Court to embrace the approach the Companies request. Business owners with religious objections to blood transfusion could exempt that life-saving service from their employees' health coverage. They could selectively exclude coverage for "sinful" medications that control pain, alleviate depression, or manage HIV. Those who believe that all modern medical treatments interfere with Divine will could refuse coverage for all but faith healing.

Amici sound alarm bells here because discriminatory limitations on family health insurance and biased attitudes of health professionals – often rooted in religious views – already contribute to persistent health disparities affecting the constituencies they represent. The Institute of Medicine has published an authoritative overview of the public health research addressing these disparities, which repeatedly notes the adverse health consequences of prejudice. Inst. Of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011) ("IOM Report") (undertaken at the request of the National Institutes of Health), http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx. For example, the IOM Report observes:

- Although LGBT people share with the rest of society the full range of health risks, they also face a profound and poorly understood set of additional health risks due largely to social stigma. *Id*. at 14.
- [I]t is clear that stigma has exerted an enormous and continuing influence on the

life and consequently the health status of LGBT individuals. *Id*. at 74-75.

- LGBT individuals face financial barriers, limitations on access to health insurance, insufficient provider knowledge, and negative provider attitudes that can be expected to have an effect on their access to health care. *Id*. [5]

The Companies' proposed elevation of religious rights to the detriment of others' needs would, in addition to its adverse effects for women's health access and equality, worsen circumstances for LGBT people and people living with HIV that already are challenging. Responding to the request of the Department of Health & Human Services, *Amicus* Lambda Legal provided examples based on its litigation and the results of the first national survey to examine barriers to care confronting LGBT people and those with HIV.[6] The survey results were

---

[5] *See also* Dep't Health & Hum. Svcs., *Lesbian, Gay, Bisexual, and Transgender Health* (2010), http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=25; Substance Abuse and Mental Health Svcs. Admin., *Top Health Issues for LGBT Populations* (2012), http://store.samhsa.gov/product/Top-Health-Issues-for-LGBT-Populations/SMA12-4684; Agency for Healthcare Research and Quality, *National Healthcare Disparities Report* 241-256 (2012), http://www.ahrq.gov/research/findings/nhqrdr/nhdr12/nhdr12_prov.pdf; *see generally* GLMA, Healthy People 2010 Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health (2001), http://glma.org/_data/n_ 0001/resources/live/HealthyCompanionDoc3.pdf.

[6] Lambda Legal, *Response to HHS RFI Nos. 0945-AA02 & 0945-ZA01 Regarding Nondiscrimination in Certain Health Programs or Activities*, pp. 3, 31-34 (Sept. 30, 2013), http://lambda

shocking. Of the nearly 5,000 respondents, more than half reported that they had experienced at least one of the following types of discrimination at the hands of health care providers:

- Refusals to touch them or use of excessive precautions;
- Harsh or abusive language;
- Physical roughness or abuse;
- Blame for their health status.[7]

Numerous respondents reported their reluctance to seek medical care after interacting with health professionals who freely had expressed religiously grounded bias against them. Examples included:

- Kara in Philadelphia, Pennsylvania, explained: "Since coming out, I have avoided seeing my primary physician because when she asked me my sexual history, I responded that I slept with women and that I was a lesbian. Her response was, 'Do you know that's against

---

legal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services, citing survey results published in Lambda Legal, *When Health Care Isn't Caring: Survey on Discrimination Against LGBT People and People Living with HIV* (2010), http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

[7] *When Health Care Isn't Caring,* at 5, 9-10. Almost 56 percent of lesbian, gay, or bisexual respondents had at least one of these experiences; 70 percent of transgender and gender-nonconforming respondents had one or more of these experiences; and almost 63 percent of respondents with HIV experienced one or more of these types of discrimination. *Id*.

the Bible, against God?'" [8]

- Joe in Minneapolis, Minnesota, recalled: "I was 36 years old … an out gay man, and … depressed after the breakup of an eight-year relationship. The doctor … told me that it was not medicine I needed but to leave my 'dirty lifestyle.' He recalled having put other patients in touch with ministers who could help gay men repent and heal from sin, and he even suggested that I simply needed to 'date the right woman' to get over my depression. The doctor even went so far as to suggest that his daughter might be a good fit for me."[9]

The stress deriving from social exclusion and stigma can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual*

---

[8] Lambda Legal, *People Speak Out*, p.1, http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_lgbt-people-and-people-living-with-hiv-speak-out.pdf.

[9] *Id*. at 2. Other surveys of LGBT people's experiences report similar findings. *See, e.g.,* National Senior Citizens Law Center, *LGBT Older Adults in Long-Term Care Facilities*, pp. 4, 11 (2011) ("More than half felt that staff would abuse or neglect an LGBT elder and other residents. … Several respondents also reported being 'prayed over' or being told that they would 'go to hell' for their sexual orientation or gender identity. … As one respondent described it, 'Insisting on praying for me feels like harassment. … It took a lot of work to get staff to stop asking me about a wife … I have been in my same-gender relationship for over 30 years.'"), http://www.nsclc.org/wp-content/uploads/2011/07/LGBT-Stories-from-the-Field.pdf.

Issues and Research Evidence, Psychological Bulletin, Vol. 129, No. 5, 674-97 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 19 Am. J. Pub. Health 1869-76 (2001).

Anti-LGBT bias often takes a physical toll as well. *See, e.g.,* David J. Lick, *et al., Minority Stress and Physical Health Among Sexual Minorities*, 8 Perspectives on Psych. Science 521 (2013) (physical and mental health disparities are related to minority stress that follows exposure to stigma); Centers for Disease Control and Prevention, *HIV Among African Americans* (2013), http://www.cdc.gov/hiv/risk/racial ethnic/aa/facts/index.html; Laura M. Bogart, *et al*., *Perceived Discrimination and Physical Health Among HIV-Positive Black and Latino Men Who Have Sex With Men*, 17[4] AIDS & Behavior 1431 (May 2013) (stress of discrimination affects health of racial and sexual minorities, especially those with HIV; chronic stressors increase vulnerability to illness), http://www.ecu.edu/cs-dhs/healthdisparities/upload/ PerceivedDiscrimination.pdf; Susan Cochran, *et al*., *Cancer-Related Risk Indicators and Preventive Screening Behaviors Among Lesbians and Bisexual Women*, 91 Am. J. Pub. Hlth., No. 4, 592, 596 (April 2001); Kate O'Hanlan, *Lesbian Health and Homophobia: Perspectives for the Treating Obstetrician/ Gynecologist*, 18 Current Probs. Obs. & Gyn. 93, 136 (1995) (same).

The cases before this Court concern access to medical care, but the principle the Companies offer is not necessarily confined to employer-provided health insurance or medical services. The notion that a

commercial business sins when it complies with rules that decline to condemn the "sinful" independent conduct of its employees could apply just as well to the non-benefits portion of employee compensation – wages. Logically, a next contention could be that religious liberty vindicates an employer's insistence that its workers refrain from using condoms or consuming pork or liquor purchases with their salaries. That is the principle advanced in this case. It is neither legally nor practically tenable within our religiously pluralistic, secular society.

Some might find these examples implausible. But for those hoping that nondiscrimination protections soon will reduce wage disparities, job loss, and unequal employment benefits based on sexual orientation or gender identity,[10] the Companies' quest for religious exemptions for commercial activity poses a potentially devastating threat with distressing historical echoes. *See generally* David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176, 1221 (1994) (desired exemptions "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.").

---

[10] *See generally* Jennifer Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A.L. Rev. 715 (2012); Randy Albelda, *et al., Poverty in the Lesbian, Gay, and Bisexual Community* (March 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

CONCLUSION

Accepting the arguments of Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corp. would unsettle, if not eviscerate, well-reasoned doctrine developed over time based on our Constitution and laws. This settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation. The proposed alternate would transform our equal opportunity marketplace into segregated dominions within which each business owner with religious convictions "becomes a law unto himself," *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

Religious freedom is a core American value and burdens on it can make for hard cases. But these are not among those hard cases, given the lack of burden on religious practice and the compelling interests served by the Affordable Care Act's insistence that large commercial enterprises provide comprehensive health insurance to all of their employees.

Respectfully submitted,

THOMAS W. UDE, JR.
Counsel of Record
CAMILLA B. TAYLOR
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, 19th Fl.
New York, NY 10005
(212) 809-8585
tude@lambdalegal.org

JENNIFER C. PIZER
JOSHUA J. JOHNSON
Lambda Legal Defense and Education Fund, Inc.
4221 Wilshire Blvd., Suite 280
Los Angeles, CA 90010
(213) 382-7600

Attorneys for Amici Curiae

January 28, 2014