No. 13-354

IN THE
Supreme Court of the United States

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

Petitioners,

v.

HOBBY LOBBY STORES INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,

Respondents.

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

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are 88 Members of Congress, representing both political parties, who share a strong interest in upholding Congress's long, bipartisan tradition of protecting religious liberty. They are in a unique position to explain the role of the Religious Freedom Restoration Act of 1993 ("RFRA") in codifying and vindicating that tradition.

Amici are:

United States Senators

Roy Blunt (R-MO)

Lamar Alexander (R-TN)

Kelly Ayotte (R-NH)

John Barrasso (R-WY)

Richard Burr (R-NC)

Tom Coburn (R-OK)

Mike Enzi (R-WY)

Deb Fischer (R-NE)

Lindsay Graham (R-SC)

John Hoeven (R-ND)

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have either been lodged with the Clerk or accompany this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation of this brief.

Jerry Moran (R-KS)

Marco Rubio (R-FL)

Tim Scott (R-SC)

Pat Toomey (R-PA)

Roger Wicker (R-MI)

Members of the House of Representatives

J. Randy Forbes (R-VA)	House Majority Leader Eric Cantor (R-VA)
Daniel Lipinski (D-IL)	Mike McIntyre (D-NC)
Robert Aderholt (R-AL)	Mike Kelly (R-PA)
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Stephen Fincher (R-TN)

John Fleming (R-LA)

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Trent Franks (R-AZ)

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Bill Johnson (R-OH)

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Alan Nunnelee (R-MS)

Pete Olson (R-TX)

Steven Palazzo (R-MS)

Robert Pittenger (R-NC)

Joseph Pitts (R-PA)

Ted Poe (R-TX)

Mike Pompeo (R-KS)

Peter Roskam (R-IL)

Keith Rothfus (R-PA)

Steve Scalise (R-LA)

Austin Scott (R-GA)

Adrian Smith (R-NE)

Steve Stockman (R-TX)

Ann Wagner (R-MO)

Tim Walberg (R-MI)

Daniel Webster (R-FL)

Lynn Westmoreland (R-GA)

Joe Wilson (R-SC)

Rob Wittman (R-VA)

SUMMARY OF ARGUMENT

Carrying on the beliefs of the nation's Founders, Congress has a long and uninterrupted tradition of enacting statutory protections of religious liberty for both individuals and entities. These bipartisan legislative efforts reflect Congress's deep concern for ensuring that laws of general application do not interfere with the free exercise of religion. The Religious Freedom Restoration Act ("RFRA") should be interpreted by this Court in light of that tradition, as embodied in the plain meaning of the statutory text.

RFRA was enacted with virtually universal support from across the political and ideological spectrum. Consistent with its tradition of protecting religious liberty, Congress intentionally drafted the statute to have broad and sweeping effect. RFRA applies to all later-enacted laws unless those laws explicitly exclude RFRA's application—something Congress has never seen fit to do. RFRA is also broad substantively. It protects a wide range of religious activity and belief and an expansive universe of both individuals and entities.

Because the Affordable Care Act ("ACA") did not disclaim RFRA's applicability, RFRA applies to the ACA's implementing regulations. As religiously oriented corporations, Respondents Hobby Lobby and Mardel are among the "persons" entitled to RFRA's protections. The Government has failed to identify, as it must in order to prevail, anything in the "text surrounding" the word "person" or in the text of related statutes that requires a contrary conclusion.

The Government's attempt to frame this case as turning on the Court's Free Exercise Clause jurisprudence is misguided. The Court should avoid deciding a constitutional question when, as is the case here, the question can be disposed of on *statutory* grounds. Moreover, this case need not turn on the Court's pre-RFRA caselaw concerning the Free Exercise Clause because, as this Court has repeatedly emphasized, RFRA did not simply codify that caselaw. Rather, it established a substantive right that is, in some ways, broader than the Free Exercise rights recognized in the Court's prior decisions.

Even if the Court reaches the constitutional question, the Free Exercise Clause applies with full force to the closely held, religiously oriented corporations at issue in this case. Like the bipartisan coalition that enacted RFRA, the Founders did not intend to extend free exercise rights only to some organizations but not to others. Moreover, the legal distinction between non-profit corporations and for-profit corporations, on which the Government's argument depends, is of modern vintage and therefore could not have guided the Founders.

For these reasons, RFRA requires that Hobby Lobby and Mardel be exempted from the ACA regulations that require them to purchase employee insurance plans that cover all forms of contraception—including even those that the companies and their owners sincerely believe cannot

be funded without contravening their religious missions.[2]

ARGUMENT

I. Congress Has a Long Bipartisan Tradition of Protecting and Preserving Religious Freedom

The Founders intentionally placed religious freedom guarantees first and foremost in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. CONST. amend. 1. Carrying on the Founder's beliefs and practice, Congress has a long bipartisan tradition of protecting religious liberty and moral conscience by providing individuals and groups religious exemptions from otherwise generally applicable laws. This tradition reflects a deep concern among Members of both parties that legislative enactments not in any way constrain religious liberties.

By enacting religious exceptions in many statutes, Congress has sought to protect religious exercise where a specific burden is clear. And in enacting RFRA, in keeping with its bipartisan practice of protecting religious liberty, Congress expressed its intent to protect against any burden on religious exercise—no matter the individual or entity

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[2] These same arguments also support the RFRA claims pursued by the petitioners in *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. 2013), which the Court has consolidated with this case.

burdened—that might arise in future, unforeseen circumstances. This Congressional intent to extend RFRA's protections to as wide a class as possible runs directly counter to the Government's attempt to read into RFRA limitations in scope that do not appear in the statutory text.

A. Congress's bipartisan tradition of protecting the free exercise of religion is reflected in many statutes.

The Founders and the founding generation were deeply concerned with ensuring that the new federal government not impinge upon the right of the people to freely exercise religion. Motivated by that same concern, Members of Congress of both parties have repeatedly worked together to protect free exercise of religion by enacting specific exceptions to generally applicable laws. In each case, these exceptions were enacted after Congress identified a circumstance in which laws would collide with the religious exercise of a particular class of individuals or groups.

For example, Congress long ago codified the well-known exemption from military service for those who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." 50 U.S.C. app. § 456(j). More recently, Congress enacted a measure that protects government employees from being forced to attend or participate in the prosecution of federal capital cases or in a federal execution if such participation "is

contrary to the moral or religious convictions of the employee." 18 U.S.C. § 3597(b) (1994).

A number of laws have also granted exceptions in various forms to accommodate those who, in the course of participating in federal health programs, object based on religious conviction to any action that may support or promote abortion, sterilization, contraception, or other procedures. For example, the Church Amendments to the Public Health Service Act—which passed unanimously in both houses of Congress, H.R. Rep. No. 93-227 (1973)—prohibited public authorities from discriminating against health workers who object to certain procedures for religious reasons, and from imposing upon such workers requirements that would be contrary to their religious beliefs. 42 U.S.C. § 300A-7(b)-(e). A further amendment to the Public Health Service Act in 1996 extended similar anti-discrimination protections to health care *entities*—not just individuals—that refuse to participate in abortion procedures. 42 U.S.C. § 238n(a).

In both the Medicare and Medicaid programs, Congress has similarly provided protections to ensure that a managed care organization is not required to provide coverage for counseling or referral services if the organization "objects to the provision of such service on moral or religious grounds." 42 U.S.C. §§ 1395w-22(j)(3)(B)(i) & 1396u-

2(b)(3)(B)(i). These are but a few examples of specific statutory protections related to health care.[3]

B. RFRA is a powerful example of Congress's bipartisan support for religious liberty protection.

While Congress has often identified and proactively addressed specific instances where religious exercise is burdened by generally applicable laws, Members of both parties have recognized that doing so in every instance is not practical. Conflicts between religious belief and federal enactments inevitably arise in unforeseen ways. To account for this, Congress enacted RFRA.

1. RFRA enjoyed broad bipartisan support.

RFRA enjoyed broad bipartisan support in both houses of Congress, a significant achievement for any major piece of legislation.

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[3] Further examples include, but are not limited to: protection for faith-based organizations seeking foreign assistance grant funds against being forced to support medical programs abroad that violate their religious beliefs, 22 U.S.C. § 7631(d)(1); protection for immigrants who object to the vaccination requirement for entry into the United States based upon religious conviction, 8 U.S.C. § 1182(g)(2)(C); an exception for health plans participating in the Federal Employees' Health Benefits Plan that object to contraceptive coverage, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 727(b), 125 Stat. 936 (Dec. 23, 2011); and a requirement that the District of Columbia provide religious and conscience protections in any District of Columbia contraceptive mandate, *id*. § 808, 125 Stat. 941.

The bill was introduced in the House by then-Representative Charles Schumer—a Democrat—and garnered 170 co-sponsors from both political parties. It was approved in committee by a unanimous 35-0 vote and was passed unanimously by the full House. H.R. Rep. No. 103-88 (1993). In the Senate, the companion bill was jointly presented by Republican Senator Orrin Hatch and Democratic Senator Edward Kennedy. It attracted a bipartisan group of 58 co-sponsors, was approved in committee by a 15-1 vote, and passed the full Senate by a vote of 97-3. S. Rep. No. 103-111 (1993).

Since then, RFRA has continued to garner the respect and support of both houses of Congress, regardless of whether they were controlled by Democrats or Republicans. RFRA contains a rule of construction that states that the law is applicable to all federal statutes adopted after November 16, 1993, unless its application is explicitly excluded in the relevant statute. 42 U.S.C. § 2000bb-3(b). Notably, in the two decades since RFRA was signed into law, in no instance has Congress ever excluded its application. Put another way, even though RFRA explicitly contemplates that Congress may pass laws that are not subject to RFRA, Congress has never done so. This deference to RFRA's broad scope indicates that the sense of Congress remains that religious liberties must continue to enjoy robust statutory protection.

2. RFRA had support from numerous organizations across the political spectrum.

The bipartisan support in Congress for RFRA's broad religious liberty protections reflected equally strong support for the legislation among a wide swath of civil society.

At the time of its passage, RFRA won the support of religiously affiliated organizations, such as the National Council of Churches, the National Association of Evangelicals, the United States Catholic Conference, the American Jewish Committee, the American Muslim Council, the Southern Baptist Convention, the Baptist Joint Committee, the Episcopal Church, the Christian Legal Society, and the Church of Jesus Christ of Latter-day Saints.

In addition to religious organizations, secular groups concerned with constitutional rights also supported RFRA. The American Civil Liberties Union, People for the American Way, Coalitions for America, Concerned Women for America, and the Home School Legal Defense Association all publicly supported the bill. 139 Cong. Rec. 4922 (1993) (statement of Sen. Kennedy).

II. Congress, in Keeping With Its Bipartisan Tradition, Enacted RFRA to Ensure Broad Protection of Religious Liberty

Consistent with Congress's long bipartisan tradition of protecting religious liberty, Congress enacted RFRA in 1993 to provide broad protections to individuals and entities engaged in the exercise of religion. RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can "demonstrate[] that [the] 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 interest. 42 U.S.C. § 2000bb-1 (a)-(b).

Congress enacted RFRA to give the free exercise of religion broader protection than was constitutionally required under *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA created "a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). That is, the law set forth a compelling interest standard for all laws substantially burdening religious exercise, even laws that are otherwise neutral toward religion. 42 U.S.C. §§ 2000bb(a), (b); *see also* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 256 (1995) (RFRA is "far more than a mere restoration of pre-*Smith* case law. It is a restoration of the high-water mark of free exercise

accommodation, established by the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder* . . . .").

By enacting RFRA, Congress took three major steps to ensure that its provisions were interpreted and applied expansively: It made RFRA a background statute applicable to every other law passed by Congress before or after RFRA's 1993 enactment; it drafted the law to protect a wide range of religious belief and activity; and it ensured that the statute applied to a broad universe of individuals and entities. Each step ultimately won the support of all Democrats and Republicans in the House and virtually all Democrats and Republicans in the Senate.

A. Congress made RFRA a background statute applicable to all later-enacted Federal laws.

Congress ensured that RFRA's "compelling interest" test would apply to all future laws and implementing regulations, 42 U.S.C. § 2000bb-3(a), unless the "law explicitly excludes such application by reference to" RFRA, *id.* § 2000bb-3(b). RFRA thus cuts "across all other federal statutes . . . modifying their reach . . .[—]a powerful current running through the entire landscape of the U.S. Code." Paulsen, *supra* at 253-54. RFRA is "both a rule of interpretation . . . and an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place." Douglas Laycock & Oliver S. Thomas, *Interpreting the*

Religious Freedom Restoration Act, 73 TEX. L. REV. 209, 211 (1994).

Congress thus intended for RFRA's compelling interest standard to apply even when that standard, or a specific religious exemption, does not appear in a particular law. Moreover, the inclusion of other religious exemptions in a statute does not exclude the statute from the reach of RFRA. Just like constitutional Free Exercise protections, RFRA protections do not turn on whether a future enactment contains an explicit religious exemption.[4] RFRA contemplates that Congress retains a choice: Congress may preemptively enact a religious accommodation in a particular law, which may be broader than (or coextensive with) RFRA. *See* 42 U.S.C. § 2000bb-4 ("Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this [Act]."); *see also* the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-3(e) ("A government may avoid the preemptive force of any provision of this chapter

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[4] Both RFRA and the Free Exercise Clause play roles even when there are explicit statutory religious exemptions in a particular law. Before RFRA, Congress enacted explicit religious accommodations in many different laws. *See supra* section I.A. But those laws could still be unconstitutional pursuant to the Free Exercise Clause if the religious exemptions were under-inclusive. Similarly, since RFRA, Congress has granted many religious exemptions in more recent laws. *See id.* But those laws can still violate RFRA if the exemptions are under-inclusive. RFRA is a floor below which religious protection, including religious exemptions, may not fall.

by . . . retaining the policy or practice [that results in a substantial burden on religious exercise] and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden."). Or, if Congress fails to include an explicit exemption (or if an exemption fails to fully alleviate the burden for all affected "persons"), a burdened individual or entity may pursue RFRA litigation and, if the government cannot justify the lack of accommodation, obtain relief.

Accordingly, in enacting RFRA, Congress, acting with unusual bipartisan support, not only imposed limits on all laws enacted prior to RFRA's passage; it also restricted the ability of future Congresses to enact laws curtailing religious liberty unless they expressly disclaimed RFRA's application.

B. Congress enacted RFRA to protect a wide range of religious activity and belief.

RFRA was also intended to be broad—and deferential—in its protection of an array of sincerely held religious beliefs. First, Congress defined "religious exercise" expansively, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7) (defining "religious exercise" for purposes of RLUIPA and RFRA); *id.* § 2000bb-2(4) (incorporating § 2000cc-5's definition).

Second, under RFRA, Congress ensured that courts are not placed in the position of having to weigh the validity of any person's religious beliefs. In the First Amendment context, this Court has long declined to second-guess the "correctness" of a claimant's interpretation of religious doctrine. *See, e.g.*, *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715-16 (1981) (explaining that "it is not within the judicial function and judicial competence to inquire whether the petitioner . . . correctly perceived the commands of [his] faith," and that where a claimant "dr[aws] a line, . . . it is not for us to say that the line he drew was an unreasonable one"). So long as an asserted religious belief is sincerely held, it may merit protection even if it is not "acceptable, logical, consistent, or comprehensible to others." *Id.* at 714.

The Court has also declined to second-guess the burden a claimant asserts by questioning the directness of its application. Rather, the inquiry focuses on the "coercive impact" upon the claimant who is "put to a choice" between violating religious beliefs and suffering secular consequences. *Id.* at 717. A burden on religious exercise exists wherever a law places "substantial pressure"—including financial consequences—"on an adherent to modify his behavior and to violate his beliefs"; "While the compulsion may be indirect, the infringement . . . is nonetheless substantial." *Id.* at 717-18.

In enacting RFRA, Congress did not alter these principles. Instead, Congress simply tasked the courts with applying the compelling interest test to balance the burden on religious beliefs with the

government's interest and chosen means of pursuing that interest. *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.").

C. RFRA protects a broad universe of individuals and entities.

Congress intended RFRA to apply to *all* individuals and entities engaged in religious activities. RFRA's protections extend broadly to all "persons." That term, as defined in the Dictionary Act, covers "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," "unless the context indicates otherwise." 1 U.S.C. § 1.

III. Continuing its Bipartisan Tradition of Protecting Religious Liberty, Congress Chose to Subject the Affordable Care Act to RFRA's Requirements

Congress's bipartisan tradition of providing broad statutory protections for religious liberty continued after passage of RFRA. As noted above, in more than two decades since RFRA's enactment, no law has disclaimed RFRA's application to that law.

The ACA is no exception. Nothing in the ACA disclaims RFRA's application. RFRA thus commands that the ACA not substantially burden religious exercise unless the government can meet its high burden of demonstrating that "[the] application of the burden to the person" is the least restrictive

means of pursuing a compelling state interest. 42 U.S.C. § 2000bb-1 (a)-(b).

Moreover, in the ACA, Congress actually sought to accommodate those religious objections that it could anticipate. For example, the ACA reaffirms prior statutory protections and exemptions related to abortion services,[5] and its Elder Justice provisions protect an elder's "right to practice his or her religion through reliance on prayer alone for healing," 42 U.S.C. § 1397j-1(b). The ACA also contains a limited religious exemption from the general requirements of the Act. *See* 26 U.S.C. §§ 5000A (d)(2)(A), (B)(ii).

That the ACA does not include a specific accommodation for those who believe facilitating access to certain kinds of contraceptives violates their sincerely held religious beliefs, however, does not indicate an intent to deny them an exemption. Again, RFRA's very purpose is to ensure that, if the government cannot satisfy its high burden, accommodations are provided to protect religious liberty, whether or not protection is explicitly granted in the text of the burdensome law.

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[5] The ACA explains that it was not intended to "have any effect on Federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion," 42 U.S.C. § 18023(c)(2), and that the Act shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits," *id.* § 18023(b)(1)(A)(i).

In this case, it is doubtful that Congress could have anticipated the particular infringements of religious liberty at issue here. The specific mandate requiring for-profit corporations (including faith-based companies) to pay for all contraceptives stems not from statutory text enacted by Congress but from agency regulations. Congress drafted and passed only the broad, general language of the Women's Health Amendment, which requires coverage without cost sharing for, "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4). It was the Health Resources and Services Administration—not Congress—that, pursuant to recommendations from the Institute of Medicine, interpreted "preventive care" as requiring coverage for the contraceptives at issue in this case. *See* HRSA, HHS, *Women's Preventive Services Guidelines*, Gov't App. at 40a-45a. That recommendation was adopted by the Departments implementing this portion of the ACA. *See* 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv). Because it was not Congress itself that wrote the coverage mandate at issue here, Congress had no occasion to consider whether, aside from RFRA, to preemptively include in the ACA specific religious exemptions related to these particular drugs and devices.[6]

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[6] Members of Congress did seek to confirm that abortion would not be covered by the Women's Health provision. See 155 Cong. (continued…)

RFRA thus governs the provision of religious exemptions from the administratively determined scope of the ACA's coverage requirements, and it does so regardless of the scope of other religious accommodations that are granted in the statute or implementing regulations.[7]

Congress could have exempted the ACA from RFRA's reach. But it chose not to, continuing its bipartisan tradition of promoting free exercise rights.

IV. The HHS Regulations At Issue Do Not Satisfy the High Bar Congress Set In RFRA

A. As a matter of statutory construction, RFRA protects for-profit corporations.

RFRA, as noted above, protects the rights of every "person." 42 U.S.C. § 2000bb-1(a). The word "person" is not limited to individuals. Under the Dictionary Act, the word "person" is presumed to include corporations and other collective entities. 1 U.S.C. § 1. This presumption can be overcome only

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Rec. 29,308 (2009) (statement of Sen. Mikulski) ("This amendment does not cover abortion. Abortion has never been defined as a preventive service. . . . There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.").

[7] *See* 45 C.F.R. § 147.131(a)-(b) (exemption for "religious employers" and accommodation for "eligible organizations"); 78 Fed. Reg. 39,870, 39,874-75 (July 2, 2013) (discussing scope of accommodation for "eligible organizations").

if the "context"—meaning "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts"—indicates that the word should be given a different meaning. *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993).

In this case, the context supports the Dictionary Act's broad definition of "person." Nothing in "the text of [RFRA] surrounding the word at issue"—"person"—or the "texts of other related congressional Acts" supports excluding for-profit entities from the Act's protections. Indeed, RLUIPA—arguably the only "other related congressional Act" because it is the only other law to which RFRA expressly refers[8]—contains explicit "Rules of Construction" specifying that the act "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Accordingly, RFRA should be construed exactly as the statute says, to include "any exercise of religion," 42 U.S.C. § 2000cc-5(7), including that of Hobby Lobby and Mardel. This should be the end of the inquiry.

By selectively quoting legislative history, the Government claims that for-profit corporations are excluded from the definition of "person." To begin

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[8] RFRA incorporates the statutory definition of "religious exercise" provided by RLUIPA. *See* 42 U.S.C. § 2000bb-2(4) ("the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title").

with, the Court cannot consider legislative history when construing the word "person" because legislative history is not relevant "context." *Rowland*, 506 U.S. at 199–200 (holding that "'context' . . . has a narrow compass" and reasoning that "[i]f Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context'").

In any case, the Government's attempt to shoehorn the Court's Free Exercise Clause jurisprudence into RFRA's legislative history is misguided. RFRA does not simply codify this Court's pre-*Smith* decisions. RFRA creates different, and in some ways broader, substantive protections beyond what the First Amendment requires. *See City of Boerne v. Flores*, 521 U.S. 507, 532, 535 (1997) ("RFRA…cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections…. [T]he legislation is broader than is appropriate if the goal is to prevent and remedy [just] constitutional violations. … [T]he Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify.").

The question whether RFRA applies to for-profit corporations, therefore, need not turn on the Court's Free Exercise Clause jurisprudence. To be sure, Congress in the "Findings" section of RFRA generally recognizes that the Framers sought to

protect the free exercise of religion in the First Amendment, 42 U.S.C. § 2000bb(a)(1), and Congress in the "Purposes" section of RFRA indicates that it is seeking to "restore the compelling interest test" for Free Exercise cases established in constitutional caselaw prior to *Smith*. *Id.* § 2000bb(b)(1). But nowhere in RFRA does Congress indicate that the Free Exercise Clause informs or limits the class of "persons" RFRA protects. The term "person"—importantly—does not appear in the Free Exercise Clause. The absence of that term in the Free Exercise Clause and its presence in RFRA implies that the scope of persons to which the statute applies is independent of the Free Exercise Clause.

It is the text of RFRA itself, which reflects Congress's longstanding bipartisan practice of protecting religious liberty, that should inform the statute's construction.

B. RFRA's background supports its protections for for-profit corporations.

Even if the Court were to consider the background behind RFRA, that background supports the conclusion that Congress intended RFRA to cover for-profit entities. The Government argues that whenever Congress has created a religious exemption that might apply to corporations or other collective entities, it has expressly limited the exemption to "churches and other religious non-profit institutions." Pet. Br. at 19–20 (citing 42 U.S.C. § 2000e-1(a), which includes an exception for any "religious corporation, association, educational

institution, or society"). This example actually undermines the Government's argument because it shows that Congress knows how to create a narrow exception when it wants to. Congress could have used this same language in RFRA. It chose not to. Instead, Congress, with virtual unanimity, deliberately chose to use the word "person," being fully aware of the word's meaning. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); *see also Mississippi ex rel Hood v. AU Optronics, Corp.*, ___ S. Ct. ___, 2014 WL 113485, at *5 (Jan. 14, 2014) ("To start, the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.' Had Congress intended the latter, it easily could have drafted language to that effect.").

In addition, the Government's claim that Congress has never afforded religious protections to for-profit corporations is simply wrong. The Medicare Choice Program, 42 U.S.C. § 1395w-21 *et seq.*, expressly states that Medicare Choice organizations are not required "to provide, reimburse for, or provide coverage of a counseling or referral service if the Medicare Choice organization offering the plan . . . objects to the provision of such service on moral or religious grounds." *Id.* § 1395w-22(j)(3)(B). Congress included a nearly identical conscience protection clause in the law regulating Medicaid Managed Care organizations. 42 U.S.C. § 1396u-2(b)(3)(B) ("Subparagraph (A) shall not be construed as requiring a medicaid managed care organization to provide, reimburse for, or provide

coverage of, a counseling or referral service if the organization . . . objects to the provision of such service on moral or religious grounds."). By including these exemptions, Congress recognized that Medicare Choice organizations and Medicaid Managed Care organizations, many of which are for-profit corporations,[9] may be guided by religious principles. Consistent with its bipartisan tradition of protecting religious liberty, Congress chose to respect those principles, regardless of whether the organizations were for-profit or non-profit corporations.

Finally, the Government contends that Congress intended to exclude for-profit entities from RFRA because, at the time of RFRA's enactment, no court cases had decided—one way or the other—whether for-profit entities were protected by the Free Exercise Clause. *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) ("This Court has not previously addressed similar RFRA or free exercise claims brought by

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[9] The majority of beneficiaries enrolled in these programs are served by for-profit plans. *See* Eric C. Schneider et al., *Quality of care in for-profit and not-for-profit health plans enrolling Medicare beneficiaries*, 118 Am. J. Med. 1392 (2005) ("By 1998 for-profit plans enrolled the majority of approximately 4.5 million Medicare health plan enrollees."); Kaiser Commission on Medicaid and the Uninsured, *Medicaid Managed Care: Key Data, Trends, and Issues* 2 (Feb. 2012), *available at* http://kff.org/medicaid/issue-brief/medicaid-and-managed-care-key-data-trends/ ("Over half of Medicaid MCO enrollees are in for-profit plans."); *see also* Bruce E. Landon & Arnold M. Epstein, *For-Profit And Not-For-Profit Health Plans Participating in Medicaid*, 20 Health Affairs 162 (2001).

closely held for-profit corporations and their controlling shareholders alleging that the mandatory provisions of certain employee benefits substantially burdens their exercise of religion."); *but cf. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("It is also conceivable that some for-profit activities could have a religious character."). From the mere absence of court cases addressing the issue, the Government asserts that Congress must have assumed that for-profit entities were excluded when it enacted RFRA. This cramped reading of RFRA is incompatible with the law's expansive language and broad protections. It is incongruous to read RFRA, a statute intended to broaden the protection of religion, as imposing unprecedented limitations on that very freedom. Congress could not have intended to impose such restrictions *sub silentio*.

C. The canon of constitutional avoidance counsels in favor of construing "person" according to RFRA's text and statutory context.

The canon of constitutional avoidance weighs heavily in favor of construing "person" to include for-profit entities like Hobby Lobby and Mardel. Here, the Government attempts to force the Court to decide an important, novel, and delicate constitutional question even though no constitutional claim is before the Court.

When choosing between an interpretation of a statute that requires the Court to resolve a serious

constitutional issue and one that does not, the Court should generally choose the latter. *See United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (internal quotation marks omitted) ("We consider the statutory question because of the cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.")). Constitutional questions should be resolved only if the "clearly expressed" language of the statute requires that it be interpreted in a manner giving rise to the constitutional question. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979) (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963), and *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

As described above, the text of RFRA falls far short of offering any such "clearly expressed" affirmative intention to exclude for-profit corporations from the scope of persons protected by RFRA. The Court therefore should avoid constitutional questions by adhering to the plain meaning of the statutory text.

D. The Free Exercise Clause does not distinguish between non-profit and for-profit corporations.

Even if the Court nonetheless were to address the constitutional question, the Free Exercise Clause applies to both non-profit corporations and for-profit corporations. No distinction between the two

corporate forms appears in the text of the Clause, which broadly and simply bars Congress from "prohibiting the free exercise" of religion.

And caselaw construing the First Amendment likewise does not distinguish between for-profit and non-profit corporations. Quite the contrary. The Court in *First National Bank of Boston v. Bellotti* stated that "[f]reedom of speech and the *other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . and the Court has not identified a separate source for the right when it has been asserted by corporations." 435 U.S. 765, 780 (1978) (emphasis added). In indicating that the bank in that case enjoyed First Amendment rights to publicize its views regarding a state income tax, the Court found no distinction in the First Amendment between for-profit and non-profit corporations. Indeed, it paid no heed to distinctions made by the dissents in that case between "profitmaking corporations" and other persons. *Id.* at 805 (White, J., dissenting); *id.* at 822 (Rehnquist, J., dissenting). This reasoning can, and should, extend to the Free Exercise Clause—one of the "other freedoms encompassed by the First Amendment."

Further, as the Court of Appeals correctly noted, the Government's argument makes every organization's constitutional Free Exercise rights dependent on Congress's or a given state legislature's malleable definition of a "non-profit" corporation. Pet. App. 39a–40a. Corporations, even unquestionably religious organizations such as

incorporated churches, would gain or lose constitutional rights depending on how Congress amended the tax code or how particular state laws define "for-profit" entities. *Id.*

The Government's proposed line would give rise to many practical questions. For instance:

- State laws on non-profit status differ among each other and from federal laws governing tax-exempt and taxable entities. Which body of law controls if state and federal law are in conflict over the status of a particular corporation? Would a corporation lose Free Exercise protections if it was considered a for-profit in one state, even if it would have been considered a non-profit if it was incorporated in another state? Would a corporation lose Free Exercise protections if it was incorporated under a state non-profit corporation law but was taxable under federal income tax law?

- Federal tax law regarding tax-exempt entities has been regularly revised, establishing different requirements for organizations to gain and retain tax-exempt status. Does the Constitution empower the regulators in the Treasury Department to expand and constrict the scope of parties entitled to Free Exercise rights by issuing new rules?

- The Treasury Department will automatically revoke an organization's tax-exempt status if it fails to make required filings. By virtue of

> the revocation, does the organization also immediately lose its Free Exercise rights though its substantive conduct has not changed?

Moreover, the Government's proposed distinction between for-profits and non-profits would have been completely alien to the Congress that adopted, and the States that ratified, the Bill of Rights. "[T]he late twentieth-century distinction between the public, forprofit, and nonprofit sectors did not apply to the US institutional landscape until the Great Depression." Helmut K. Anheier, Nonprofit Organizations: Theory, management, policy 28 (2005) (citing P.D. Hall, Inventing the Nonprofit Sector and Other Essays on Philanthropy, Volunteerism, and Nonprofit Organizations (Johns Hopkins University Press 2001)). Federal law did not grant tax-exemptions to charitable organizations until the end of the nineteenth century. *See* Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, Statistics of Income Bulletin 105, 106 (2008). The requirement that a charitable organization operate on a non-profit basis was first introduced in the Revenue Act of 1909. *Id.* at 107. The Founders therefore could not have intended to treat for-profit corporations as disfavored persons, in comparison to non-profits, for purposes of the First Amendment.

The Free Exercise Clause reflects the Founders' intent to broadly protect the religious liberties of individuals and entities. For centuries, Congress has worked across partisan divides to protect, promote, and expand these rights. Like the

Free Exercise Clause, RFRA, a powerful example of this bipartisan tradition, does not limit its application to non-profit entities exercising these rights. Accordingly, the Court should exempt Hobby Lobby and Mardel from those ACA regulations that would infringe on the companies' free exercise rights guaranteed by RFRA.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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