

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 13–354 and 13–356

SYLVIA BURWELL, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL., PETITIONERS
13–354 *v.*
HOBBY LOBBY STORES, INC., ET AL.

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

AND

CONESTOGA WOOD SPECIALTIES CORPORATION
ET AL., PETITIONERS
13–356 *v.*
SYLVIA BURWELL, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.

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

[June 30, 2014]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See *ante*, at 16–49. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a

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religion-based exemption, the government, *i.e.*, the general public, can pick up the tab. See *ante*, at 41–43.¹

The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See *infra*, at 6–8. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.*, dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.

I

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 856 (1992). Congress acted on that understand-

¹The Court insists it has held none of these things, for another less restrictive alternative is at hand: extending an existing accommodation, currently limited to religious nonprofit organizations, to encompass commercial enterprises. See *ante*, at 3–4. With that accommodation extended, the Court asserts, “women would still be entitled to all [Food and Drug Administration]-approved contraceptives without cost sharing.” *Ante*, at 4. In the end, however, the Court is not so sure. In stark contrast to the Court’s initial emphasis on this accommodation, it ultimately declines to decide whether the highlighted accommodation is even lawful. See *ante*, at 44 (“We do not decide today whether an approach of this type complies with RFRA . . .”).

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ing when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs. Carrying out Congress’ direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court’s resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary.² Particular services were to be recommended by the U. S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that “many women’s health advocates and medical professionals believe are critically important.” 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women’s Health Amendment, which added to the ACA’s minimum coverage requirements a new category of preventive services specific to women’s health.

Women paid significantly more than men for preventive care, the amendment’s proponents noted; in fact, cost

²See 42 U. S. C. §300gg–13(a)(1)–(3) (group health plans must provide coverage, without cost sharing, for (1) certain “evidence-based items or services” recommended by the U. S. Preventive Services Task Force; (2) immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention; and (3) “with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration”).

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barriers operated to block many women from obtaining needed care at all. See, e.g., *id.*, at 29070 (statement of Sen. Feinstein) (“Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”); *id.*, at 29302 (statement of Sen. Mikulski) (“co-payments are [often] so high that [women] avoid getting [preventive and screening services] in the first place”). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. See, e.g., *id.*, at 29768 (statement of Sen. Durbin) (“This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] This expanded access will reduce unintended pregnancies.”).

As altered by the Women’s Health Amendment’s passage, the ACA requires new insurance plans to include coverage without cost sharing of “such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)],” a unit of HHS. 42 U. S. C. §300gg–13(a)(4). Thus charged, the HRSA developed recommendations in consultation with the Institute of Medicine (IOM). See 77 Fed. Reg. 8725–8726 (2012).³ The IOM convened a group of independent experts, including “specialists in disease prevention [and] women’s health”; those experts prepared a report evaluating the efficacy of a number of preventive services. IOM, *Clinical Prevention Services for Women: Closing the Gaps 2* (2011) (hereinafter IOM Report). Consistent with the findings of “[n]umerous health professional associations” and other organizations, the IOM experts determined that preven-

³The IOM is an arm of the National Academy of Sciences, an organization Congress established “for the explicit purpose of furnishing advice to the Government.” *Public Citizen v. Department of Justice*, 491 U. S. 440, 460, n. 11 (1989) (internal quotation marks omitted).

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tive coverage should include the “full range” of FDA-approved contraceptive methods. *Id.*, at 10. See also *id.*, at 102–110.

In making that recommendation, the IOM’s report expressed concerns similar to those voiced by congressional proponents of the Women’s Health Amendment. The report noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. See, e.g., *id.*, at 19 (“[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving . . . medical tests and treatments and to filling prescriptions for themselves and their families.”); *id.*, at 103–104, 107 (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); *id.*, at 103 (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face “increased odds of preterm birth and low birth weight”).

In line with the IOM’s suggestions, the HRSA adopted guidelines recommending coverage of “[a]ll [FDA-] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁴ Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the

⁴HRSA, HHS, Women’s Preventive Services Guidelines, available at <http://www.hrsa.gov/womensguidelines/> (all Internet materials as visited June 27, 2014, and available in Clerk of Court’s case file), reprinted in App. to Brief for Petitioners in No. 13–354, pp. 43–44a. See also 77 Fed. Reg. 8725–8726 (2012).

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HRSA guidelines, subject to certain exceptions, described *infra*, at 25–27.⁵ This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women’s Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called “conscience amendment,” which would have enabled any employer or insurance provider to deny coverage based on its asserted “religious beliefs or moral convictions.” 158 Cong. Rec. S539 (Feb. 9, 2012); see *id.*, at S1162–S1173 (Mar. 1, 2012) (debate and vote).⁶ That amendment, Senator Mikulski observed, would have “pu[t] the personal opinion of employers and insurers over the practice of medicine.” *Id.*, at S1127 (Feb. 29, 2012). Rejecting the “conscience amendment,” Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga⁷ might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990). In *Smith*, two members of the Native American Church were dis-

⁵ 45 CFR §147.130(a)(1)(iv) (2013) (HHS); 29 CFR §2590.715–2713(a)(1)(iv) (2013) (Labor); 26 CFR §54.9815–2713(a)(1)(iv) (2013) (Treasury).

⁶ Separating moral convictions from religious beliefs would be of questionable legitimacy. See *Welsh v. United States*, 398 U. S. 333, 357–358 (1970) (Harlan, J., concurring in result).

⁷ As the Court explains, see *ante*, at 11–16, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.

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missed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a religious ceremony. Oregon law forbade the consumption of peyote, and this Court, relying on that prohibition, rejected the employees' claim that the denial of unemployment benefits violated their free exercise rights. The First Amendment is not offended, *Smith* held, when "prohibiting the exercise of religion . . . is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision." *Id.*, at 878; see *id.*, at 878–879 ("an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). The ACA's contraceptive coverage requirement applies generally, it is "otherwise valid," it trains on women's well being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.⁸

⁸See *Wisconsin v. Yoder*, 406 U. S. 205, 230 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *Estate of Thornton v. Caldor, Inc.*, 472 U. S. 703 (1985) (invalidating state statute requiring employers to accommodate an employee's Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees). Notably, in construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc *et seq.*, the Court has cautioned that "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U. S. 709, 720 (2005); see *id.*, at 722 ("an accommodation must be measured so that it does not override other significant interests"). A

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The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 565, 85 P. 3d 67, 93 (2004) ("We are unaware of any decision in which . . . [the U. S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). In sum, with respect to free exercise claims no less than free speech claims, "[y]our right to swing your arms ends just where the other man's nose begins." Chafee, *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest." 42 U. S. C. §2000bb-1(a), (b)(2). In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 424 (2006).

RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling

balanced approach is all the more in order when the Free Exercise Clause itself is at stake, not a statute designed to promote accommodation to religious beliefs and practices.

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interest test as set forth in *Sherbert v. Verner*, 374 U. S. 398 (1963) and *Wisconsin v. Yoder*, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” §2000bb(b)(1).⁹ See also §2000bb(a)(5) (“[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”); *ante*, at 48 (agreeing that the pre-*Smith* compelling interest test is “workable” and “strike[s] sensible balances”).

The legislative history is correspondingly emphatic on RFRA’s aim. See, e.g., S. Rep. No. 103–111, p. 12 (1993) (hereinafter Senate Report) (RFRA’s purpose was “only to overturn the Supreme Court’s decision in *Smith*,” not to “unsettle other areas of the law.”); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was “designed to restore the compelling interest test for deciding free exercise claims.”). In line with this restorative purpose, Congress expected courts considering RFRA claims to “look to free exercise cases decided prior to *Smith* for guidance.” Senate Report 8. See also H. R. Rep. No. 103–88, pp. 6–7 (1993) (hereinafter House Report) (same). In short, the Act reinstates the law as it was prior to *Smith*, without “creat[ing] . . . new rights for any religious practice or for any potential litigant.” 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act’s moderate purpose, it is hardly surprising that RFRA’s enactment in 1993 provoked little controversy. See Brief for Senator Murray et al. as *Amici Curiae* 8 (hereinafter Senators

⁹Under *Sherbert* and *Yoder*, the Court “requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.” *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 894 (1990) (O’Connor, J., concurring in judgment).

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Brief) (RFRA was approved by a 97-to-3 vote in the Senate and a voice vote in the House of Representatives).

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. See *ante*, at 6, n. 3, 7, 17, 25–27. To support its conception of RFRA as a measure detached from this Court’s decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc *et seq.*, which altered RFRA’s definition of the term “exercise of religion.” RFRA, as originally enacted, defined that term to mean “the exercise of religion under the First Amendment to the Constitution.” §2000bb–2(4) (1994 ed.). See *ante*, at 6–7. As amended by RLUIPA, RFRA’s definition now includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” §2000bb–2(4) (2012 ed.) (cross-referencing §2000cc–5). That definitional change, according to the Court, reflects “an obvious effort to effect a complete separation from First Amendment case law.” *Ante*, at 7.

The Court’s reading is not plausible. RLUIPA’s alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise. See *Rasul v. Myers*, 563 F. 3d 527, 535 (CA DC 2009) (Brown, J., concurring) (“There is no doubt that RLUIPA’s drafters, in changing the definition of ‘exercise of religion,’ wanted to broaden the scope of the kinds of practices protected by RFRA, not increase the universe of individuals protected by RFRA.”); H. R. Rep.

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No. 106–219, p. 30 (1999). See also *Gilardi v. United States Dept. of Health and Human Servs.*, 733 F. 3d 1208, 1211 (CADC 2013) (RFRA, as amended, “provides us with no helpful definition of ‘exercise of religion.’”); *Henderson v. Kennedy*, 265 F. 3d 1072, 1073 (CADC 2001) (“The [RLUIPA] amendments did not alter RFRA’s basic prohibition that the [g]overnment shall not substantially burden a person’s exercise of religion.”)¹⁰

Next, the Court highlights RFRA’s requirement that the government, if its action substantially burdens a person’s religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. “[B]y imposing a least-restrictive-means test,” the Court suggests, RFRA “went beyond what was required by our pre-*Smith* decisions.” *Ante*, at 17, n. 18 (citing *City of Boerne v. Flores*, 521 U. S. 507 (1997)). See also *ante*, at 6, n. 3. But as RFRA’s statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith*. See *supra*, at 8–9. See also Senate Report 9 (RFRA’s “compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.”); House Report 7 (same).

The Congress that passed RFRA correctly read this Court’s pre-*Smith* case law as including within the “compelling interest test” a “least restrictive means” requirement. See, e.g., Senate Report 5 (“Where [a substantial] burden is placed upon the free exercise of religion, the Court ruled [in *Sherbert*], the Government must demon-

¹⁰RLUIPA, the Court notes, includes a provision directing that “[t]his chapter [*i.e.*, RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution.” 42 U. S. C. §2000cc–3(g); see *ante*, at 6–7, 26. RFRA incorporates RLUIPA’s definition of “exercise of religion,” as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety.

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strate that it is the least restrictive means to achieve a compelling governmental interest.”). And the view that the pre-*Smith* test included a “least restrictive means” requirement had been aired in testimony before the Senate Judiciary Committee by experts on religious freedom. See, e.g., Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 78–79 (1993) (statement of Prof. Douglas Laycock).

Our decision in *City of Boerne*, it is true, states that the least restrictive means requirement “was not used in the pre-*Smith* jurisprudence RFRA purported to codify.” See *ante*, at 6, n. 3, 17, n. 18. As just indicated, however, that statement does not accurately convey the Court’s pre-*Smith* jurisprudence. See *Sherbert*, 374 U. S., at 407 (“[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights.”); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”). See also Berg, The New Attacks on Religious Freedom Legislation and Why They Are Wrong, 21 *Cardozo L. Rev.* 415, 424 (1999) (“In *Boerne*, the Court erroneously said that the least restrictive means test ‘was not used in the pre-*Smith* jurisprudence.’”).¹¹

C

With RFRA’s restorative purpose in mind, I turn to the

¹¹The Court points out that I joined the majority opinion in *City of Boerne* and did not then question the statement that “least restrictive means . . . was not used [pre-*Smith*].” *Ante*, at 17, n. 18. Concerning that observation, I remind my colleagues of Justice Jackson’s sage comment: “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.” *Massachusetts v. United States*, 333 U. S. 611, 639–640 (1948) (dissenting opinion).

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Act’s application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby’s and Conestoga’s claims: Do for-profit corporations rank among “person[s]” who “exercise . . . religion”? Assuming that they do, does the contraceptive coverage requirement “substantially burden” their religious exercise? If so, is the requirement “in furtherance of a compelling government interest”? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA’s compelling interest test, as noted, see *supra*, at 8, applies to government actions that “substantially burden *a person’s exercise of religion.*” 42 U. S. C. §2000bb–1(a) (emphasis added). This reference, the Court submits, incorporates the definition of “person” found in the Dictionary Act, 1 U. S. C. §1, which extends to “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” See *ante*, at 19–20. The Dictionary Act’s definition, however, controls only where “context” does not “indicat[e] otherwise.” §1. Here, context does so indicate. RFRA speaks of “*a person’s exercise of religion.*” 42 U. S. C. §2000bb–1(a) (emphasis added). See also §§2000bb–2(4), 2000cc–5(7)(a).¹² Whether

¹²As earlier explained, see *supra*, at 10–11, RLUIPA’s amendment of the definition of “exercise of religion” does not bear the weight the Court places on it. Moreover, it is passing strange to attribute to RLUIPA any purpose to cover entities other than “religious assembl[ies] or institution[s].” 42 U. S. C. §2000cc(a)(1). But cf. *ante*, at 26. That law applies to land-use regulation. §2000cc(a)(1). To permit commercial enterprises to challenge zoning and other land-use regula-

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a corporation qualifies as a “person” capable of exercising religion is an inquiry one cannot answer without reference to the “full body” of pre-*Smith* “free-exercise caselaw.” *Gilardi*, 733 F. 3d, at 1212. There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.¹³ The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819). Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, no desires.” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 466 (2010) (opinion concurring in part and dissenting in part).

The First Amendment’s free exercise protections, the

tions under RLUIPA would “dramatically expand the statute’s reach” and deeply intrude on local prerogatives, contrary to Congress’ intent. Brief for National League of Cities et al. as *Amici Curiae* 26.

¹³The Court regards *Gallagher v. Crown K kosher Super Market of Mass., Inc.*, 366 U. S. 617 (1961), as “suggest[ing] . . . that for-profit corporations possess [free-exercise] rights.” *Ante*, at 26–27. See also *ante*, at 21, n. 21. The suggestion is barely there. True, one of the five challengers to the Sunday closing law assailed in *Gallagher* was a corporation owned by four Orthodox Jews. The other challengers were human individuals, not artificial, law-created entities, so there was no need to determine whether the corporation could institute the litigation. Accordingly, the plurality stated it could pretermitt the question “whether appellees ha[d] standing” because *Braunfeld v. Brown*, 366 U. S. 599 (1961), which upheld a similar closing law, was fatal to their claim on the merits. 366 U. S., at 631.

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Court has indeed recognized, shelter churches and other nonprofit religion-based organizations.¹⁴ “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community,” and “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment). The Court’s “special solicitude to the rights of religious organizations,” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. ____, __ (2012) (slip op., at 14), however, is just that. No such solicitude is traditional for commercial organizations.¹⁵ Indeed, until today, religious

¹⁴See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. __ (2012); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993); *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U. S. 378 (1990).

¹⁵Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. E.g., 42 U. S. C. §2000e–1(a) (Title VII exemption from prohibition against employment discrimination based on religion for “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities”); 42 U. S. C. §12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. Cf. *ante*, at 28.

The Court does identify two statutory exemptions it reads to cover for-profit corporations, 42 U. S. C. §§300a–7(b)(2) and 238n(a), and infers from them that “Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations,” *ante*, at 28. The Court’s inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. Cf. *ante*, at 28, n. 27 (“the protection provided by §238n(a) differs significantly from the protection provided by

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exemptions had never been extended to any entity operating in “the commercial, profit-making world.” *Amos*, 483 U. S., at 337.¹⁶

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the

RFRA”). Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. See §238n(c) (“health care entity” covered by exemption is a term defined to include “an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions”); Tozzi, Whither Free Exercise: *Employment Division v. Smith* and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?, 48 J. Catholic Legal Studies 269, 296, n. 133 (2009) (“Catholic physicians, but not necessarily hospitals, . . . may be able to invoke [§238n(a)] . . .”); cf. S. 137, 113th Cong., 1st Sess. (2013) (as introduced) (Abortion Non-Discrimination Act of 2013, which would amend the definition of “health care entity” in §238n to include “hospital[s],” “health insurance plan[s],” and other health care facilities). These provisions are revealing in a way that detracts from one of the Court’s main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.

Moreover, the exemption codified in §238n(a) was not enacted until three years after RFRA’s passage. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, §515, 110 Stat. 1321–245. If, as the Court believes, RFRA opened all statutory schemes to religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.

¹⁶That is not to say that a category of plaintiffs, such as resident aliens, may bring RFRA claims only if this Court expressly “addressed their [free-exercise] rights before *Smith*.” *Ante*, at 27. Continuing with the Court’s example, resident aliens, unlike corporations, are flesh-and-blood individuals who plainly count as persons sheltered by the First Amendment, see *United States v. Verdugo-Urquidez*, 494 U. S. 259, 271 (1990) (citing *Bridges v. Wixon*, 326 U. S. 135, 148 (1945)), and *a fortiori*, RFRA.

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work force of for-profit corporations. See 42 U. S. C. §§2000e(b), 2000e-1(a), 2000e-2(a); cf. *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63, 80–81 (1977) (Title VII requires reasonable accommodation of an employee’s religious exercise, but such accommodation must not come “at the expense of other[employees]”). The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court’s attention.¹⁷ One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not “hide elephants in mouseholes”). The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1169 (CA10 2013) (Briscoe, C. J., concurring in part and dissenting in part) (legislative record lacks “any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations”). See also Senators Brief 10–13 (none of the

¹⁷I part ways with JUSTICE KENNEDY on the context relevant here. He sees it as the employers’ “exercise [of] their religious beliefs within the context of their own closely held, for-profit corporations.” *Ante*, at 2 (concurring opinion). See also *ante*, at 45–46 (opinion of the Court) (similarly concentrating on religious faith of employers without reference to the different beliefs and liberty interests of employees). I see as the relevant context the employers’ asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers’ religious beliefs.

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cases cited in House or Senate Judiciary Committee reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations).

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. See *ante*, at 20–25. See also *ante*, at 3 (KENNEDY, J., concurring) (criticizing the Government for “distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation”).¹⁸ Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court’s side. Recognition of the discrete characters of “ecclesiastical and lay” corporations dates back to Blackstone, see 1 W. Blackstone, *Commentaries on the Laws of England* 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. See *Terrett v. Taylor*, 9 Cranch 43, 49 (1815) (describing religious corporations); *Trustees of Dartmouth College*, 4 Wheat., at 645 (discussing “eleemosynary” corporations, including those “created for the promotion of religion”). To reiterate, “for-profit corporations are different from religious non-

¹⁸According to the Court, the Government “concedes” that “nonprofit corporation[s]” are protected by RFRA. *Ante*, at 19. See also *ante*, at 20, 24, 30. That is not an accurate description of the Government’s position, which encompasses only “churches,” “*religious* institutions,” and “*religious* non-profits.” Brief for Respondents in No. 13–356, p. 28 (emphasis added). See also Reply Brief in No. 13–354, p. 8 (“RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.”).

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profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers].” *Gilardi*, 733 F. 3d, at 1242 (Edwards, J., concurring in part and dissenting in part) (emphasis deleted).

Citing *Braunfeld v. Brown*, 366 U. S. 599 (1961), the Court questions why, if “a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can’t . . . do the same?” *Ante*, at 22 (footnote omitted). See also *ante*, at 16–17. But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court’s conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, *Braunfeld* is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits.

The Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.¹⁹ Little doubt that RFRA

¹⁹The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate on that, the Court says, for “it seems unlikely” that large corporations “will often assert RFRA claims.” *Ante*, at 29. Perhaps so, but as Hobby Lobby’s case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. “Closely held” is not synonymous with “small.” Hobby Lobby is

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claims will proliferate, for the Court’s expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA “person[s],” to gain an exemption, they must demonstrate that the contraceptive coverage requirement “substantially burden[s] [their] exercise of religion.” 42 U. S. C. §2000bb–1(a). Congress no doubt meant the modifier “substantially” to carry weight. In the original draft of RFRA, the word “burden” appeared unmodified. The word “substantially” was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See

hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in \$33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than \$136 billion in revenues and employs some 140,000 persons. See *Forbes*, *America’s Largest Private Companies 2013*, available at <http://www.forbes.com/largest-private-companies/>.

Nor does the Court offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations. The Court is satisfied that “[s]tate corporate law provides a ready means for resolving any conflicts,” *ante*, at 30, but the authorities cited in support of that proposition are hardly helpful. See Del. Code Ann., Tit. 8, §351 (2011) (certificates of incorporation may specify how the business is managed); 1 J. Cox & T. Hazen, *Treatise on the Law of Corporations* §3:2 (3d ed. 2010) (section entitled “Selecting the state of incorporation”); *id.*, §14:11 (observing that “[d]espite the frequency of dissension and deadlock in close corporations, in some states neither legislatures nor courts have provided satisfactory solutions”). And even if a dispute settlement mechanism is in place, how is the arbiter of a religion-based intracorporate controversy to resolve the disagreement, given this Court’s instruction that “courts have no business addressing [whether an asserted religious belief] is substantial,” *ante*, at 36?

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139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court’s pre-*Smith* case law, “does not require the Government to justify every action that has some effect on religious exercise.” *Ibid.*

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens’ and Hahns’ “belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” *Ante*, at 36.²⁰ I agree with the Court that the Green and Hahn families’ religious convictions regarding contraception are sincerely held. See *Thomas*, 450 U. S., at 715 (courts are not to question where an individual “dr[aws] the line” in defining which practices run afoul of her religious beliefs). See also 42 U. S. C. §§2000bb–1(a), 2000bb–2(4), 2000cc–5(7)(A).²¹ But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between “factual allegations that [plaintiffs’]

²⁰The Court dismisses the argument, advanced by some *amici*, that the \$2,000-per-employee tax charged to certain employers that fail to provide health insurance is less than the average cost of offering health insurance, noting that the Government has not provided the statistics that could support such an argument. See *ante*, at 32–34. The Court overlooks, however, that it is not the Government’s obligation to prove that an asserted burden is *insubstantial*. Instead, it is incumbent upon plaintiffs to demonstrate, in support of a RFRA claim, the substantiality of the alleged burden.

²¹The Court levels a criticism that is as wrongheaded as can be. In no way does the dissent “tell the plaintiffs that their beliefs are flawed.” *Ante*, at 37. Right or wrong in this domain is a judgment no Member of this Court, or any civil court, is authorized or equipped to make. What the Court must decide is not “the plausibility of a religious claim,” *ante*, at 37 (internal quotation marks omitted), but whether accommodating that claim risks depriving others of rights accorded them by the laws of the United States. See *supra*, at 7–8; *infra*, at 27.

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beliefs are sincere and of a religious nature,” which a court must accept as true, and the “legal conclusion . . . that [plaintiffs’] religious exercise is substantially burdened,” an inquiry the court must undertake. *Kaemmerling v. Lappin*, 553 F. 3d 669, 679 (CADDC 2008).

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. *Bowen v. Roy*, 476 U. S. 693 (1986), is instructive. There, the Court rejected a free exercise challenge to the Government’s use of a Native American child’s Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father’s religious belief that “use of [his daughter’s Social Security] number may harm [her] spirit,” the Court concluded that the Government’s internal uses of that number “place[d] [no] restriction on what [the father] may believe or what he may do.” *Id.*, at 699. Recognizing that the father’s “religious views may not accept” the position that the challenged uses concerned only the Government’s internal affairs, the Court explained that “for the adjudication of a constitutional claim, the Constitution, rather than an individual’s religion, must supply the frame of reference.” *Id.*, at 700–701, n. 6. See also *Hernandez v. Commissioner*, 490 U. S. 680, 699 (1989) (distinguishing between, on the one hand, “question[s] [of] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds,” and, on the other, “whether the alleged burden imposed [by the challenged government action] is a substantial one”). Inattentive to this guidance, today’s decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The re-

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quirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see *supra*, at 3–6, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.” *Grote v. Sebelius*, 708 F. 3d 850, 865 (CA7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be “substantia[ly],” had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage

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for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. See IOM Report 102–107. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 14–15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as *Amici Curiae* 4, 6–7, 15–16; 78 Fed. Reg. 39872 (2013); IOM Report 107.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. See *id.*, at 105.²² Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his “argument . . . would apply just as well if the employer said ‘no contraceptives’” (internal quotation marks added)).

Perhaps the gravity of the interests at stake has led the

²²IUDs, which are among the most reliable forms of contraception, generally cost women more than \$1,000 when the expenses of the office visit and insertion procedure are taken into account. See Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 *J. Adolescent Health* S59, S60 (2013). See also Winner et al., Effectiveness of Long-Acting Reversible Contraception, 366 *New Eng. J. Medicine* 1998, 1999 (2012).

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Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. See *ante*, at 40.²³ It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage, Brief for Guttmacher Institute et al. as *Amici Curiae* 16; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, Factors Associated With Contraceptive Choice and Inconsistent Method Use, United States, 2004, 40 Perspectives on Sexual & Reproductive Health 94, 98 (2008); and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, Garipey, Simon, Patel, Creinin, & Schwarz, The Impact of Out-of-Pocket Expense on IUD Utilization Among Women With Private Insurance, 84 Contraception e39, e40 (2011). See also Eisenberg, *supra*, at S60 (recent study found that women who face out-of-pocket IUD costs in excess of \$50 were "11-times less likely to obtain an IUD than women who had to pay less than \$50"); Postlethwaite, Trussell, Zoolakis, Shabear, & Petitti, A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change, 76 Contraception 360, 361–362 (2007) (when one health system eliminated patient cost sharing for IUDs, use of this form of contraception more than doubled).

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court

²³Although the Court's opinion makes this assumption grudgingly, see *ante*, at 39–40, one Member of the majority recognizes, without reservation, that "the [contraceptive coverage] mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees." *Ante*, at 2 (opinion of KENNEDY, J.).

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suggests, Congress would not have created these exclusions. See *ante*, at 39–40.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993, 29 U. S. C. §2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U. S. C. §630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now governs employers with 20 or more employees); Americans With Disabilities Act, 42 U. S. C. §12111(5)(A) (applicable to employers with 15 or more employees); Title VII, 42 U. S. C. §2000e(b) (originally exempting employers with fewer than 25 employees, see *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 505, n. 2 (2006), the statute now governs employers with 15 or more employees).

The ACA’s grandfathering provision, 42 U. S. C. §18011, allows a phasing-in period for compliance with a number of the Act’s requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See 45 CFR §147.140(g). Hobby Lobby’s own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby’s counsel explained that the “grandfathering requirements mean that you can’t make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing.” App. in No. 13–354, pp. 39–40. Counsel acknowledged that, “just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time.” *Id.*, at 40.²⁴ The percentage of employees in grand-

²⁴Hobby Lobby’s *amicus* National Religious Broadcasters similarly

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fathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Foundation & Health Research & Educ. Trust, Employer Benefits 2013 Annual Survey 7, 196. In short, far from ranking as a categorical exemption, the grandfathering provision is “temporary, intended to be a means for gradually transitioning employers into mandatory coverage.” *Gilardi*, 733 F. 3d, at 1241 (Edwards, J., concurring in part and dissenting in part).

The Court ultimately acknowledges a critical point: RFRA’s application “*must* take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.” *Ante*, at 42, n. 37 (quoting *Cutter v. Wilkinson*, 544 U. S. 709, 720 (2005); emphasis added). No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. *supra*, at 7–8; *Prince v. Massachusetts*, 321 U. S. 158, 177 (1944) (Jackson, J., dissenting) (“[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”).

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA’s least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers’ religious objections to providing

states that, “[g]iven the nature of employers’ needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the ‘grandfather’ exclusion is *de minimis* and transitory at best.” Brief for National Religious Broadcasters as *Amicus Curiae* in No. 13–354, p. 28.

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insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets. See *supra*, at 7–8, 27.²⁵

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Ante*, at 41. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." 78 Fed. Reg. 39888. Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated. *Ibid.* Moreover, Title X of the Public Health Service Act, 42 U. S. C. §300 *et seq.*, "is the nation's only dedicated source of federal

²⁵As the Court made clear in *Cutter*, the government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause. 544 U. S., at 720–722. "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U. S., at 606, a "rich mosaic of religious faiths," *Town of Greece v. Galloway*, 572 U. S. ___, ___ (2014) (KAGAN, J., dissenting) (slip op., at 15). Consequently, one person's right to free exercise must be kept in harmony with the rights of her fellow citizens, and "some religious practices [must] yield to the common good." *United States v. Lee*, 455 U. S. 252, 259 (1982).

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funding for safety net family planning services.” Brief for National Health Law Program et al. as *Amici Curiae* 23. “Safety net programs like Title X are not designed to absorb the unmet needs of . . . insured individuals.” *Id.*, at 24. Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative. See *supra*, at 6.

And where is the stopping point to the “let the government pay” alternative? Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U. S. 290, 303 (1985), or according women equal pay for substantially similar work, see *Dole v. Shenandoah Baptist Church*, 899 F. 2d 1389, 1392 (CA4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?²⁶ Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See *ante*, at 3–4, 9–10, 43–45. “At a minimum,” according to the Court, such an approach would not “impinge on [Hobby Lobby’s and Conestoga’s] religious belief.” *Ante*, at 44. I have already discussed the “special solicitude” generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths. See *supra*, at 14–17.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organiza-

²⁶Cf. *Ashcroft v. American Civil Liberties Union*, 542 U. S. 656, 666 (2004) (in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine “whether the challenged regulation is the least restrictive means among *available*, effective alternatives” (emphasis added)).

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tions. “We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims.” *Ante*, at 44. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable,²⁷ counsel responded: “We haven’t been offered that accommodation, so we haven’t had to decide what kind of objection, if any, we would make to that.” Tr. of Oral Arg. 86–87.

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. See Brief for Petitioners in No. 13–356, p. 64. A tax credit, of course, is one variety of “let the government pay.” In addition to departing from the existing employer-based system of health insurance, Conestoga’s alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish,

²⁷On brief, Hobby Lobby and Conestoga barely addressed the extension solution, which would bracket commercial enterprises with non-profit religion-based organizations for religious accommodations purposes. The hesitation is understandable, for challenges to the adequacy of the accommodation accorded religious nonprofit organizations are currently *sub judice*. See, e.g., *Little Sisters of the Poor Home for the Aged v. Sebelius*, ___ F. Supp. 2d ___, 2013 WL 6839900 (Colo., Dec. 27, 2013), injunction pending appeal granted, 571 U.S. ___ (2014). At another point in today’s decision, the Court refuses to consider an argument neither “raised below [nor] advanced in this Court by any party,” giving Hobby Lobby and Conestoga “[no] opportunity to respond to [that] novel claim.” *Ante*, at 33. Yet the Court is content to decide this case (and this case only) on the ground that HHS could make an accommodation never suggested in the parties’ presentations. RFRA cannot sensibly be read to “requir[e] the government to . . . refute each and every conceivable alternative regulation,” *United States v. Wilgus*, 638 F. 3d 1274, 1289 (CA10 2011), especially where the alternative on which the Court seizes was not pressed by any challenger.

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i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States v. Lee*, 455 U. S. 252 (1982). *Lee*, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with *Lee*'s religious beliefs, the burden was not unconstitutional. *Id.*, at 260–261. See also *id.*, at 258 (recognizing the important governmental interest in providing a “nationwide . . . comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees”).²⁸ The Government urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13–356, p. 18. In contrast, today's Court dismisses *Lee* as a tax case. See *ante*, at 46–47. Indeed, it was a tax case and the Court in *Lee* homed in on “[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation.” 455 U. S., at 259.

But the *Lee* Court made two key points one cannot confine to tax cases. “When followers of a particular sect enter into commercial activity as a matter of choice,” the Court observed, “the limits they accept on their own conduct as a matter of conscience and faith are not to be

²⁸As a sole proprietor, *Lee* was subject to personal liability for violating the law of general application he opposed. His claim to a religion-based exemption would have been even thinner had he conducted his business as a corporation, thus avoiding personal liability.

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superimposed on statutory schemes which are binding on others in that activity.” *Id.*, at 261. The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would “operat[e] to impose the employer’s religious faith on the employees.” *Ibid.*²⁹ No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door,³⁰ at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp.

²⁹ Congress amended the Social Security Act in response to *Lee*. The amended statute permits Amish sole proprietors and partnerships (but not Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes only for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U. S. C. §3127(a)(2), (b)(1). Thus, employers with sincere religious beliefs have no right to a religion-based exemption that would deprive employees of Social Security benefits without the employee’s consent—an exemption analogous to the one Hobby Lobby and Conestoga seek here.

³⁰ Cf. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U. S. 290, 299 (1985) (disallowing religion-based exemption that “would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors”).

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941, 945 (SC 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), aff'd in relevant part and rev'd in part on other grounds, 377 F. 2d 433 (CA4 1967), aff'd and modified on other grounds, 390 U. S. 400 (1968); *In re Minnesota ex rel. McClure*, 370 N. W. 2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), appeal dismissed, 478 U. S. 1015 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, ____ N. M. ____, 309 P. 3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), cert. denied, 572 U. S. ____ (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine . . . the plausibility of a religious claim"? *Ante*, at 37.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian

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Scientists, among others)?³¹ According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test.” Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today’s decision.

The Court, however, sees nothing to worry about. Today’s cases, the Court concludes, are “concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.” *Ante*, at 46. But the Court has assumed, for RFRA purposes, that the interest in women’s health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women’s Health Amendment.

There is an overriding interest, I believe, in keeping the courts “out of the business of evaluating the relative merits of differing religious claims,” *Lee*, 455 U. S., at 263, n. 2 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be “perceived as favoring one religion over another,” the very “risk the Establishment Clause was designed to preclude.” *Ibid.* The Court, I fear,

³¹Religious objections to immunization programs are not hypothetical. See *Phillips v. New York*, ___ F. Supp. 2d ___, 2014 WL 2547584 (EDNY, June 5, 2014) (dismissing free exercise challenges to New York’s vaccination practices); Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom* (2007), available at http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

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has ventured into a minefield, cf. *Spencer v. World Vision, Inc.*, 633 F. 3d 723, 730 (CA9 2010) (O’Scannlain, J., concurring), by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed “for a religious purpose,” “engage[d] primarily in carrying out that religious purpose,” and not “engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts.” See *id.*, at 748 (Kleinfeld, J., concurring).

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

BREYER and KAGAN, JJ., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 13–354 and 13–356

13–354 SYLVIA BURWELL, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL., PETITIONERS
v.
HOBBY LOBBY STORES, INC., ET AL.

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

AND

13–356 CONESTOGA WOOD SPECIALTIES CORPORATION
ET AL., PETITIONERS
v.
SYLVIA BURWELL, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.

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

[June 30, 2014]

JUSTICE BREYER and JUSTICE KAGAN, dissenting.

We agree with JUSTICE GINSBURG that the plaintiffs’ challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III–C–1 of JUSTICE GINSBURG’s dissenting opinion.