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., ET AL.

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

BRIEF OF CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, NEW YORK, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

This case implicates issues of critical importance to Amici States, including (1) the integrity of the corporate form, which is a creation of state law; and (2) the health and welfare of our citizens, including their access to preventive health care services.

Although the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq*., applies only to the federal government, *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Tenth Circuit's decision would render broad areas of state regulation vulnerable to challenge. Courts considering religious challenges to state laws and regulations reference federal decisions under RFRA where parties invoke free exercise protections under the First Amendment, state constitutions, and state statutes analogous to RFRA. *See*, *e.g.*, *State v. Hardesty*, 214 P.3d 1004, 1007-09 (Ariz. 2009) (en banc); *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033-35 (Fla. 2004); *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 18 (Iowa 2012); *Champion v. Sec'y of State*, 761 N.W.2d 747, 758 (Mich. Ct. App. 2008); *Barr v. City of Sinton*, 295 S.W.3d 287, 306 (Tex. 2009).

Moreover, related federal law, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, which is subject to a similar analytical framework, applies directly

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief, or received notice prior to the due date and waived 10-days' advance notice.

to states. Similar to RFRA, RLUIPA bars state and local governments from enforcing certain land use regulations that impose a substantial burden on "the religious exercise of a person" absent demonstration of a compelling government interest.

Accordingly, the Tenth Circuit's decision will affect the States and their citizens both through its direct impact on federal regulation and through its indirect impact on state regulation.

SUMMARY OF ARGUMENT

The federal government's regulations implementing the Patient Protection and Affordable Care Act (ACA) carefully and appropriately address an area of potential tension between the government's interests in expanding women's access to contraceptives and the rights of individuals and religious institutions to act in accordance with their religious beliefs. The pertinent regulations address this tension by exempting "religious employers" from the requirement that employer health plans include coverage for FDA-approved contraceptives without employee cost sharing, and by providing other accommodations for group health plans offered by nonprofit religious organizations that object to the coverage requirement on religious grounds. *See* 78 Fed. Reg. 39,870, 39,873-82, 39,886-88 (July 2, 2013) (preamble to final regulations adopted at 45 C.F.R. § 147.131). The exemption and accommodation are designed to protect both religious

freedom and public health. *Id.* The Tenth Circuit's decision upsets the delicate balance by greatly expanding the types of entities that may seek exemption from the coverage requirement to include corporations established for commercial, rather than religious, purposes.

1. The court of appeals' decision merits review because its determination that a for-profit corporation may claim exemption from religion-neutral regulation based on the religious objections of its owners would have broad consequences. The decision's reasoning could allow corporate owners to improperly disregard the corporate form and assert religious motivations to avoid regulatory obligations, leading to unfair market advantages and threatening the uniform enforcement of essential state regulation. Resolving disputes arising from such religiously motivated "opt outs" could compel courts and state governments to examine the religious beliefs of corporate owners and corporations, threatening excessive entanglement with religion.

2. The Tenth Circuit's rejection of the federal government's compelling interests in promulgating the contraceptive coverage requirement – which include safeguarding public health and ensuring gender equity in access to healthcare – merits review in its own right. Access to contraceptive services is critical to the health of women and infants; women's economic and social wellbeing; and women's opportunities to participate fully in society. In discounting the federal government's compelling interests, the

Tenth Circuit erred in a way that threatens state regulation intended to further these same compelling interests.

ARGUMENT

I. Review Should Be Granted Because the Tenth Circuit's Expansive Interpretation of RFRA Improperly Disregards the Corporate Form and, if Not Reversed, Will Undermine Competition and Hurt the States

In holding that, under RFRA, a corporation exercises the religious beliefs of its owners, the Tenth Circuit's decision strikes at the heart of corporations law by disregarding the fundamental principle of separate corporate personality. In so doing, the decision invites abuse of the corporate form and entangling inquiries into the religion of corporations and their owners, among other negative effects.

A. The Tenth Circuit's Decision Subverts Basic Principles of Corporations Law

By attributing the religious beliefs of Hobby Lobby's and Mardel's owners to the corporate entities they own and manage, and by allowing these for-profit corporations to assert a right to exemption from a neutral law based on those beliefs, the Tenth Circuit's decision marks a "radical revision of . . . the law of corporations." Pet. App. 123a (Briscoe, C.J., concurring

in part and dissenting in part). If allowed to stand, the decision would undermine the integrity of the corporate form.

Underlying the law of corporations is the principle that, with limited exceptions, owners and shareholders are "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). This principle applies even to corporations owned by a single shareholder. *Id.* The principle of separate corporate personality is recognized under the law of Oklahoma, where respondents Hobby Lobby Stores, Inc., and Mardel, Inc., are incorporated, including as applied specifically to family businesses. *See Sautbine v. Keller*, 423 P.2d 447, 451 (Okla. 1966) ("[E]ven a family corporation is a separate and distinct legal entity from its shareholders."); *see also Carter v. Schuster*, 227 P.3d 149, 154 (Okla. 2009).

Following from the principle of separate corporate personality, the business owner makes a conscious choice when electing to incorporate: accept the advantages of the corporate form, including and in particular the limitation of personal liability, in exchange for "g[i]v[ing] up several prerogatives, including that of direct legal action to redress an injury to him as primary stockholder in the business." *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988).

The court of appeals' decision, however, would turn the traditional protection afforded by the corporate

form inside out, by allowing business *owners* to shield their *companies* from regulatory obligations based on alleged injury to their individual religious beliefs. This approach conflicts with fundamental notions of fairness and upsets the balance of benefits and burdens inherent in the decision to incorporate. "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

B. If Uncorrected, the Tenth Circuit's Decision Will Hurt Markets, Invite Religious Entanglement, and Threaten the States' Ability to Regulate in the Public Interest

The Tenth Circuit's decision, and specifically its disregard of the corporate form, will destabilize markets, lead to excessive government entanglement in religion, and undermine state regulation in the public interest, among other harms, if it is not reversed.

1. Allowing a commercial corporation to escape the costs of neutral regulation based on the religious beliefs of its owners would harm market competition by providing unfair competitive advantages to businesses asserting religious objections to a rule. The

Tenth Circuit's expansive interpretation of RFRA creates incentives for corporations and their owners to assert religious motivation as the basis for avoiding regulation. Because regulation increases the cost of doing business, a corporation that successfully exempts itself from regulation can obtain a competitive advantage over other corporations.

The Tenth Circuit's decision also would invite corporations to claim a religious basis for regulatory exemptions based on owners' opposition to a particular regulation, or to government regulation in general. For example, the CEO of one for-profit firm seeking to enjoin application of the contraceptive coverage requirement on religious grounds has been reported as stating that his objection was actually motivated by his personal opposition to government regulation. Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, Salon, Apr. 15, 2013.[2] Whether or not pursuing competitive advantage, a business successfully claiming a religious basis for exemption would be advantaged in relation to its competitors.

2. Further, by invalidating the "uniform application" of laws as to corporations that seek a religious exemption, the Tenth Circuit's decision would thrust the courts and government into "a potentially entangling inquiry" regarding whether a practice "is the result of sincere religious belief" or some other

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[2] http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/ (last visited Oct. 18, 2013).

incentive. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983).

Practically, the notion that a corporation may exercise religion would pose a number of challenges to federal and state governments and courts. For example, how should a court determine the religion of a corporation where a minority of owners or shareholders does not share the religious views of the majority? Or where shareholders disagree on the obligations imposed by their commonly-held religion? Should a court determine whether, or to what degree, a corporation's position on a regulation is based on sincere religious belief or some other motivation, such as political philosophy or perceived business advantage?

Inquiry into Hobby Lobby's and its owners' religious beliefs, or the extent of the coverage requirement's burden on those beliefs, might consider that Hobby Lobby provided insurance coverage of contraceptives to which its owners now object before the owners became aware of the new federal requirement. Pet. 10; *see also* Pet. App. 145a (Matheson, J., concurring in part and dissenting in part) (noting that plaintiffs had "not provided sufficient facts about specific alleged religious beliefs of the corporations with respect to the contraceptives at issue here or how those beliefs are defined and exercised by the corporations").

In short, holding that a corporation may be a "person" under RFRA ultimately could undermine,

rather than advance, the religion-protective and -insulating principles at the foundation of the First Amendment.

3. Finally, the Tenth Circuit's decision is problematic for the States by rendering both state and federal regulation of business activity vulnerable to claims for religious exemption, including in the areas of public safety, civil rights, social welfare, land use, housing, employment, and public health.[3] The Tenth Circuit's determination that for-profit corporations may exercise religion could "profoundly affect the relationship between the government and potentially millions of business entities in our society in ways we can only begin to anticipate." Pet. App. 150a (Matheson, J., concurring in part and dissenting in part).

In rejecting a First Amendment right of individuals to be presumed exempt from laws on the basis of their religious beliefs, this Court has expressed concern that applying strict scrutiny to neutral laws of general applicability "open[s] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Employ't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990). Extension of RFRA's protections

[3] For the reasons explained in the Statement of Interest, although RFRA does not apply to the States, RFRA precedents may impact the States where referenced as authority in actions involving analogous laws, including RLUIPA and state RFRA statutes, or the free exercise clauses of the Federal and state constitutions.

to for-profit corporations would reify the concern expressed in *Smith*, as it would open the prospect of exemptions for commercial entities from obligations imposed by almost every area of government regulation affecting business. *See* Pet. App. 128a-129a (Briscoe, C.J., concurring in part and dissenting in part).

In the arena of health alone, corporations asserting recognized religious objections could refuse to provide coverage for blood transfusions, end-of-life care, psychiatric treatment, and medications and devices containing porcine or bovine products. Pet. App. 128a, n.8 (Briscoe, C.J., concurring in part and dissenting in part). Corporations could similarly claim an extraordinary "private right to ignore" laws barring discrimination on the basis of gender or religion, minimum wage and child labor laws, and countless other laws that govern modern society. *See Smith*, 494 U.S. at 886, 888-89.

Moreover, if the Tenth Circuit's broad interpretation of "person" were adopted under RLUIPA, commercial enterprises could claim religion-based exemptions from state and local land use regulations. This could allow corporations to assert rights to expand structures or conduct business operations that otherwise would be prohibited under neutral zoning regulations, as religious institutions have done, seeking to override local government interests such as limiting traffic and density of use, *see, e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 346, 353 (2d Cir. 2007) ($12 million expansion of

religious school facilities), or preserving land for industrial and economic uses, *see, e.g.*, *Int'l Church of Foursquare Gospel v. City of San Leandro,* 673 F.3d 1059, 1062, 1071 (9th Cir. 2011) (purchase and use of land in industrial park by church).

The Tenth Circuit's suggestion that its holding is limited to the circumstances presented by the two corporations before it is not supportable. *See* Pet. App. 42a-43a. Even were its holding limited to closely-held or family-run companies, it would still affect large numbers of businesses and employees: family-owned or controlled businesses account for some 80-90% of all U.S. businesses, including more than one-third of the Fortune 500 companies, and account for 60% of all U.S. employment. Conway Center for Family Business, *Family Business Facts, Figures and Fun*.[4] These businesses include some of the largest companies in the United States, such as Cargill, Incorporated; Mars, Incorporated; Bechtel Corporation; PriceWaterhouseCoopers LLP; and Publix Super Markets, Inc. Andrea Murphy, *America's Largest Private Companies 2012,* Forbes, Nov. 28, 2012.[5] As noted by Chief Judge Briscoe in his dissent, "it is difficult to imagine why the majority's holding would not apply to any number of large, closely-held corporations that employ far more employees . . . than Hobby Lobby and Mardel." Pet. App. 128a.

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[4] http://www.familybusinesscenter.com/resources/family-business-facts/ (last visited Oct. 18, 2013).

[5] http://www.forbes.com/sites/andreamurphy/2012/11/28/americas-largest-private-companies-2012/.

II. Review Should Be Granted Because the Tenth Circuit's Analysis of the Compelling Interests Supporting the Contraceptive Coverage Requirement Was Flawed and Will Have Negative and Far-Reaching Consequences

Review also is warranted because the Tenth Circuit's analysis of the federal government's interests in the contraceptive coverage requirement is fundamentally flawed. If unaddressed, the decision will undermine important state and federal public health initiatives designed to protect the health and welfare of our citizens, including but not limited to those designed to ensure access to contraceptive services.

A. The Government Has Compelling Interests in the Contraceptive Coverage Requirement

The Tenth Circuit improperly discounted the significance of the government interests that undergird the contraceptive coverage requirement. Access to contraceptives is critical to women's health, autonomy, and equality, all compelling government interests.

1. Access to contraceptives is essential to promote the health of women in the most literal sense. Women who have unintended pregnancies are more likely to receive reduced prenatal care; to smoke and consume alcohol during pregnancy; and to experience

depression and other health problems during and after pregnancy. Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 103 (2011) (*Gaps*). Pregnancy may aggravate certain health conditions such as diabetes, hypertension, arthritis and coronary artery disease. *See Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 462 (N.Y. 2006) (*Serio*). Indeed, pregnancy can endanger the health of women with conditions such as hypertension and heart problems. *See Gaps*, *supra*, at 103-04.

Unintended pregnancies can jeopardize the health of women and children in other ways. Nearly 12 million women take at least one of 168 drugs that can endanger their lives or the lives of their fetuses if taken during a pregnancy; some of these drugs may only be dispensed after a negative test for pregnancy. Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* 27-29, 67-69 (2010) (*Health Care Refusals*).[6] Many of these drugs are used to treat conditions that are quite common, including cardiovascular disease, epilepsy, diabetes, and depression. Depression alone affects 25% of all women, and a third of low-income women, who often cannot afford to buy contraceptives over the counter without the help of insurance. *Id.* at 28-32; Usha Ranji & Alina Salganicoff, *Women's Health Care*

[6] *Available at* http://www.healthlaw.org/images/stories/Health_Care_Refusals_Undermining_Quality_Care_for_Women.pdf.

Chartbook: Key Findings from the Kaiser Women's Health Survey 1 (2011).[7]

Contraceptives also provide important health benefits unrelated to contraception, as the government noted in supporting the final employer coverage regulations. 78 Fed. Reg. at 39,872. Contraceptives have been shown, among other things, to help decrease the risk of certain ovarian and uterine cancers; to help treat excessive menstrual bleeding (which can lead to anemia); to alleviate severe menstrual pain; and to prevent menstrual-related migraines. *See id.*; Rachel Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* 3 (2011);[8] U.S. Dep't of Health & Human Servs., Agency for Healthcare Research & Quality, Nat'l Guideline Clearinghouse, *Noncontraceptive Uses of Hormonal Contraceptives* (2010).[9]

2. Ensuring access to contraceptive services also is critical to enabling women to make personal, intimate choices that will have long-lasting impact on their lives. Whether or not to bear a child is "central to . . . personal dignity and autonomy." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). As with other methods of reproductive control, "people

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[7] *Available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8164.pdf.

[8] *Available at* http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf.

[9] *Available at* http://www.guideline.gov/content.aspx?id=15428 (last visited Oct. 18, 2013).

have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of . . . contraception." *Id.* at 856. The government's contraceptive coverage requirement promotes the ability of citizens, both male and female, to organize their lives, fostering harmony at home and productivity in the workplace.

The need to protect women's dignity and autonomy is particularly acute with respect to survivors of rape. Nearly 15% of women have been victims of rape at least once. Alison Siskin, *Violence Against Women Act: Reauthorization, Federal Funding and Recent Developments, in Violence Against Women* 23, 25 (L.P. Gordon, ed., 2002). Without access to emergency contraception, raped women could be forced to bear children conceived during a non-consensual encounter, with life-long impacts. One report calculates that, among victims of *reported* sexual assaults, 12,677 pregnancies could have been avoided in 2005 with better access to contraceptives. *Health Care Refusals, supra,* at 41. And these numbers do not take into account incidents of unreported rape. *Id.*

3. Relatedly, access to contraceptives promotes equality between the sexes, because "[t]he 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." *Casey*, 505 U.S. at 851. Increased access to contraceptives was responsible for the "large increases" of applications by women to professional schools of law, medicine,

dentistry, architecture, economics, and engineering in the 1970s. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Contraceptives and Women's Career and Marriage Decisions*, 110 J. of Pol. Econ. 730, 749 (2002). Contraceptive access encourages investment in careers – for both men and women – by providing certainty in family planning. *Id.* at 731.

In addition, the contraceptive coverage requirement facilitates economic equality between the sexes in a most immediate way: by equalizing the cost of family planning. Currently, women disproportionately bear the burden of paying for contraceptive services and pregnancy, despite the obvious fact that both men and women bear responsibility for creating a pregnancy. For example, evidence presented to the California Legislature in connection with the adoption of that State's contraceptive coverage requirements demonstrated that "women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs, due in part to the cost of prescription contraceptives and the various costs of unintended pregnancies. . . ." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92 (Cal. 2004) (*Catholic Charities*). Thus, ensuring access to contraception through employer-provided insurance plans helps reduce gender inequities in out-of-pocket health care costs.

4. Improving access to contraception also serves government interests in reducing public costs. For example, a California Medicaid program that expanded access to contraceptives to otherwise ineligible

women saved the State an estimated $1.3 billion in medical, welfare, and other social service costs in 2007 alone (and more than double that amount, $2.7 billion, in cost savings to the federal government during the same year). M. Antonia Biggs, et al., U.C. San Francisco, Bixby Center for Global Reproductive Health, *Cost-Benefit Analysis of the California Family PACT Program for Calendar Year 2007* 16-20 (2010).[10] These savings resulted from decreased public costs for pregnancy and post-pregnancy medical care, income support, food stamps, parental support, child care, and early and special education. *Id.*

B. The Tenth Circuit's Compelling Interest Analysis Is Flawed

The court of appeals committed several plain errors in determining that the government's asserted interests in the contraceptive coverage requirement were too broadly formulated and diminished by exemptions.

1. In characterizing the federal government's interests in public health and gender equity as overly general, the court of appeals failed to take account of the specific interests and benefits identified by the federal government in support of the coverage requirement. These include increasing

[10] *Available at* http://bixbycenter.ucsf.edu/publications.html (under "Publications," scroll to "Family PACT Publications," and click on link under subheading "Reports").

access to preventive health services; reducing health care costs; addressing women's unique health care needs and burdens; alleviating disadvantages for women in the workforce; improving the economic and social status of women; reducing disparities in the costs of health services; and protecting women's interests in autonomy over their procreative choices. 77 Fed. Reg. 8725, 8727-29 (Feb. 15, 2012); Br. for Appellees, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, at 35-38 (10th Cir. March 15, 2013), *available at* 2013 WL 1192937. The court of appeals' reference to the government's interests in "public health" and "gender equity" fails to recognize that these are umbrella concepts that encompass a panoply of more specific interests that the contraceptive coverage requirement is designed to advance.

2. The court of appeals asserted that several exemptions from the coverage requirement undercut the strength of the government's stated interests. However, the government interests are in no way diminished because fewer than all women are covered. As the California Supreme Court held with respect to a similar coverage obligation under state law, simply by "eliminat[ing] a form of gender discrimination in the provision of health benefits," the provision achieves its goals, even if some women remain without access. *Catholic Charities*, 85 P.3d at 94.

Further, the exemptions provided under the regulations are both rational and limited. They are the exact opposite of the kind of exceptions that

previously have concerned this Court – i.e., those that are arbitrary, or adopted for reasons that are "difficult to see" and "never explain[ed]." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-34 (2006).

The exemption for certain nonprofit religious employers is anything but arbitrary, as it aims to accommodate religious objections. *See Catholic Charities*, 85 P.3d at 78. "[T]he government may (and sometimes must) accommodate religious practices." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Thus, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission." *Id.* at 335. Accordingly, religious exemptions do not undermine the government's interest in the regulation, but rather reflect a careful calibration of the competing interests in the regulatory requirements and in respect for religious belief. *See* 78 Fed. Reg. at 39,874 (noting that revised definition of exempt "religious employer" in contraceptive coverage regulations "continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement").

Similarly, the transitional exemption for certain existing health plans represents "a reasonable accommodation of the competing interests in administrative efficiency and fairness." *Sebelius v. Auburn*

Reg'l Med. Ctr., 133 S. Ct. 817, 830 (2013) (Sotomayor, J., concurring). And it bears emphasizing that this exemption is only temporary, with most "grandfathered" plans expected to lose their exempt status by the end of 2013. 78 Fed. Reg. at 39,887 n.49.

Finally, as the government has noted in its petition, the court of appeals' belief that employers with fewer than 50 employees are exempt from its contraceptive coverage requirement is factually inaccurate. Pet. 30-31. Employers with fewer than 50 employees are not subject to tax penalties for failing to offer health coverage to their employees, but if those smaller employers do sponsor a health plan, the plan must meet all coverage requirements. *Id.* ACA aims to expand small business employees' access to employer-provided coverage by allowing small businesses to obtain insurance through exchanges where costs are lower than on the open market because of pooled risk. *See* Small Bus. Admin., *Key Provisions Under the Affordable Care Act for Businesses with Up to 50 Employees*.[11]

ACA is estimated to guarantee some 47 million women access to women's preventive health services, including contraceptives. *See* Adelle Simmons & Laura Skopec, *47 Million Women Will Have Guaranteed Access to Women's Preventive Services with Zero Cost-Sharing Under the Affordable Care Act*, ASPE

[11] http://www.sba.gov/content/employers-with-up-to-50-employees (last visited Oct. 18, 2013).

Issue Brief (July 31, 2012).[12] Many of these women could not afford to purchase either contraceptives or coverage on their own. *See* Kaiser Family Foundation, *Women's Health Insurance Coverage Fact Sheet* 1.[13] As prices of medical services outpace incomes, insurance becomes vital in ensuring access to these services. Ruth Robertson & Sarah R. Collins, *Realizing Health Reform's Potential* 4-5 (2011).[14]

C. The Court of Appeals' Interest Analysis Could Render State Laws Supported by Similar Government Interests Vulnerable to Future Challenge

Numerous state and federal laws are justified on the basis that they further the government's compelling interests in protecting public health and promoting gender equity. The Tenth Circuit's rejection of those goals as sufficiently compelling to sustain the contraceptive coverage requirement against a RFRA challenge could call into question other regulatory efforts that are premised on the same governmental interests.

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[12] *Available at* http://aspe.hhs.gov/health/reports/2012/womensPreventiveServicesACA/ib.pdf.

[13] *Available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/6000-10.pdf.

[14] *Available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf.

State laws in a variety of contexts have been upheld against religious objections on the ground that "public health" constitutes a compelling interest. Examples include laws increasing access to contraceptives, *Catholic Charities*, 85 P.3d 67; *Serio*, 859 N.E.2d 459; requiring individuals to obtain health insurance coverage, *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011), *aff'd sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012); requiring vaccinations prior to attending school, *see Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 90 (E.D.N.Y. 1987); *Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644, 646 (Ark. 1965); preventing pharmacists from refusing to transfer patient prescriptions on conscientious objector grounds, *Noesen v. State Dep't of Regulation & Licensing, Pharmacy Examining Bd.,* 751 N.W.2d 385, 393-94 (Wis. Ct. App. 2008); prohibiting poisonous snake handling in religious services, *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111-12 (Tenn. 1975); and prohibiting use of certain drugs for religious purposes, *State v. Hardesty*, 214 P.3d 1004, 1009 (Ariz. 2009).

The sufficiency of this government interest has been successfully invoked to uphold laws outside the religious context, as well. Examples include laws preventing livestock from intermingling with native wildlife, *Hagener v. Wallace*, 47 P.3d 847, 855 (Mont. 2002), *overruled on other grounds by Shammel v. Canyon Resources Corp.*, 82 P.3d 912 (Mont. 2003) (Commerce Clause); and giving residency preference for medical school admissions, *Buchwald v. Univ. of*

New Mexico Sch. of Medicine, 159 F.3d 487, 497-99 (10th Cir. 1998) (right to travel).

Similarly, failing to respect government's interests in gender equity and in eliminating sex discrimination could lay open to challenge a range of other statutes at the state level. States have enacted their own statutes to ensure women's access to health services, including but not limited to contraception, premised on these interests. *See, e.g., Catholic Charities*, 85 P.3d 67 (California's Women's Contraception Equity Act); *Serio*, 859 N.E.2d 459 (New York's Women's Health and Wellness Act).

But religion-based challenges to state regulation enacted for the benefit of women extend beyond public health to, for example, the provision of public accommodations. Thus, as against associational rights challenges, this Court has recognized that "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests" that justify public accommodation statutes prohibiting sex discrimination. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). Lower courts have followed suit in other freedom of association cases challenging sex-discrimination prohibitions. *See, e.g., Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 148 (2d Cir. 2007); *State v. Burning Tree Club, Inc.*, 554 A.2d 366, 384 (Md. 1989).

In short, these interests are widely recognized to be sufficiently important to sustain a wide array of

laws and regulations. The Tenth Circuit's flawed analysis should not be allowed to undermine lawmaking premised on these interests, which is of critical importance to the States.

* * *

The freedom of individuals to exercise the religion of their choosing is one of the most important values in our society, as reflected by its enshrinement in the federal Constitution. The federal government's contraceptive coverage regulations under ACA respect that freedom through inclusion of appropriate exemptions, while also advancing the similarly compelling interests in public health and gender equality in access to health care. The court of appeals' decision would upset that balance and threaten far-reaching impacts on the States beyond the issues presented by this action.

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CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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