No. 13-567

In the Supreme Court of the United States

FRANCIS A. GILARDI, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 13-567

FRANCIS A. GILARDI, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-76) is reported at 733 F.3d 1208. The opinion of the district court (Pet. App. 81-102) is reported at 926 F. Supp. 2d 273.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2013. The petition for a writ of certiorari was filed on November 5, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Most Americans with private health coverage obtain it through an employment-based group health plan. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & tbl.1-1 (Dec.

2008). The cost of such employment-based health coverage is typically covered by a combination of employer and employee contributions. *Id.* at 4.

The federal government heavily subsidizes group health plans[1] and has also established certain minimum coverage standards for them. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 42 U.S.C. 300gg-4 (Supp. II 1996); 26 U.S.C. 9811 (Supp. III 1997); 29 U.S.C. 1185 (Supp. II 1996). In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 42 U.S.C. 300gg-6 (Supp. IV 1998); 29 U.S.C. 1185b (Supp. IV 1998).

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[2] Congress provided for additional minimum standards for group health plans (and health insurers offering coverage in both the group and individual markets).

a. As relevant here, the Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-

---

[1] While employees pay income and payroll taxes on their cash wages, they typically do not pay taxes on their employer's contributions to their health coverage. 26 U.S.C. 106(a). The aggregate federal tax subsidy for employment-based health coverage was nearly $242 billion in 2009. Office of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011*, tbl.16-1 & n.7, at 211, 213 (2010).

[2] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

services coverage requirement).[3] "Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011) (IOM Report). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more on responding to acute problems and the urgent needs of patients than on prevention." *Id.* at 16-17. To address this problem, the Act requires coverage of preventive services without cost sharing in four categories.

First, group health plans must cover items or services that have an "A" or "B" rating from the United

---

[3] This preventive-services coverage requirement applies to, among other types of health coverage, employment-based group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and, with respect to such plans, is subject to ERISA's enforcement mechanisms. 29 U.S.C. 1185d (Supp. V 2011). It is also enforceable through imposition of tax penalties on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834 (Supp. V 2011). With respect to health insurers in the individual and group markets, States may enforce the Act's insurance market reforms, including the preventive-services coverage requirement. 42 U.S.C. 300gg-22(a)(1) (Supp. V 2011). If the Secretary of Health and Human Services determines that "a State has failed to substantially enforce" one of the insurance market reforms with respect to such insurers, she conducts such enforcement herself and may impose civil penalties. 42 U.S.C. 300gg-22(a)(2) (Supp. V 2011); see 42 U.S.C. 300gg-22(b)(1)(A) and (2) (Supp. V 2011). The Act's grandfathering provision has the effect of allowing certain existing plans to transition to providing coverage for recommended preventive services without cost sharing and to complying with some of the Act's other requirements. See Pet. 30, *Sebelius* v. *Hobby Lobby Stores, Inc.*, cert. granted, No. 13-354 (Nov. 26, 2013).

States Preventive Services Task Force (Task Force). 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011). The Task Force is composed of independent health-care professionals who "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community." 42 U.S.C. 299b-4(a) (Supp. V 2011). Services rated "A" or "B" are those for which the Task Force has the greatest certainty of a net benefit for patients. 75 Fed. Reg. 41,733 (July 19, 2010). The Task Force has awarded those ratings to more than 40 preventive services, including cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure. *Id.* at 41,741-41,744.

Second, the Act requires coverage of immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. 42 U.S.C. 300gg-13(a)(2) (Supp. V. 2011). The Committee has recommended routine vaccination to prevent a variety of vaccine-preventable diseases that occur in children and adults. 75 Fed. Reg. at 41,740, 41,745-41,752.

Third, the Act requires coverage of "evidence-informed preventive care and screenings" for "infants, children, and adolescents" as provided for in "guidelines supported by the Health Resources and Services Administration" (HRSA), which is a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011). The relevant HRSA guidelines were developed "by multidisciplinary professionals in the relevant fields to provide a framework for improving children's health and reduc-

ing morbidity and mortality based on a review of the relevant evidence." 75 Fed. Reg. at 41,733. They include a schedule of examinations and screenings. *Id.* at 41,753-41,755.

Fourth, and as particularly relevant here, the Act requires coverage, "with respect to women, [of] such additional preventive care and screenings" (not covered by the Task Force's recommendations) "as provided for in comprehensive guidelines supported" by HRSA. 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision in response to a legislative record showing that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18. In particular, "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). And women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." *Id.* at 29,302 (statement of Sen. Mikulski); see IOM Report 19-20.

Because HRSA did not have relevant guidelines at the time of the Act's enactment, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8726 (Feb. 15, 2012); IOM Report 1. The Institute is part of the National Academy of Sciences, a "semi-private organization" Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); see IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined preventive services as measures "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.* at 3. Based on its review of the evidence, the Institute then recommended a number of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. *Id.* at 8-12.

The Institute also recommended coverage for the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as "sterilization procedures" and "patient education and counseling for women with reproductive capacity." IOM Report 10; see *id.* at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, *Birth Control: Medicines To Help You* (May 2013), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies have adverse health consequences for both mothers and newborn children. IOM Report 102-103 (discussing consequences, including inadequate prenatal care, higher incidence of depression during pregnancy, and increased likelihood of preterm birth and low

birth weight). In addition, the Institute observed, use of contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. The Institute also noted that greater use of contraceptives lowers abortion rates. *Id.* at 105. Finally, the Institute explained that "contraception is highly cost-effective," as the "direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002." *Id.* at 107.

HRSA adopted guidelines consistent with the Institute's recommendations, including all FDA-approved "contraceptive methods [and] sterilization procedures," as well as "patient education and counseling for all women with reproductive capacity," as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 5, 2013). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred to in this brief as the contraceptive-coverage requirement).

b. The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as a "religious employer." 45 C.F.R. 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provi-

sion that refers to "churches, their integrated auxiliaries, and conventions or associations of churches," and the "exclusively religious activities of any religious order." *Ibid.* (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)).

The implementing regulations also establish certain religion-related accommodations for group health plans established or maintained by "eligible organization[s]." 45 C.F.R. 147.131(b). An accommodation is available to a non-profit religious organization that has religious objections to providing coverage for some or all contraceptive services. *Ibid.* If a non-profit religious organization is eligible for such an accommodation, the women who participate in its plan will have access to contraceptive coverage without cost sharing through an alternative mechanism established by the regulations. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

"Consistent with religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," the definition of an organization eligible for an accommodation "does not extend to for-profit organizations." 78 Fed. Reg. at 39,875. The Departments that issued the preventive-services coverage regulations explained that they were "unaware of any court granting a religious exemption to a for-profit organization, and decline[d] to expand the definition of eligible organization to include for-profit organizations." *Ibid.*

3. Petitioners are two affiliated for-profit corporations, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc., (collectively referred to here as Freshway Foods), and two brothers who each

hold a 50% ownership stake in the corporations (collectively referred to here as the Gilardis). Pet. App. 117-118. Freshway Foods packages and distributes fresh produce and other refrigerated products in 23 states. *Id.* at 118. It has nearly 400 full-time employees. *Ibid.* Employees of the corporations obtain health coverage through a self-insured employee benefits plan. *Id.* at 121.

The Gilardis "believe in the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization." Pet. App. 119. In this suit, petitioners contend that the requirement that the Freshway Foods group health plan cover FDA-approved contraceptives violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b)(2). Pet. App. 6. Specifically, petitioners contend that RFRA entitles the Freshway Foods plan to an exemption from the contraceptive-coverage requirement because "[p]laintiffs cannot arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives * * * without violating their sincerely-held religious beliefs and moral values." *Id.* at 121.[4]

a. The district court denied petitioners' motion for a preliminary injunction, holding that neither Freshway Foods nor the Gilardis had established a likelihood of success on the merits of their RFRA claims.

---

[4] Petitioners also alleged claims under the First Amendment and Administrative Procedure Act, ch. 324, 60 Stat. 237, see Pet. App. 126-131, but they did not raise those claims on appeal.

Pet. App. 81-102. The court rejected Fresh Foods' claim because it determined that a "secular, for-profit corporation[] that [is] engaged in the processing, packing, and shipping of produce and other refrigerated products" is not a person engaged in the exercise of religion within the meaning of RFRA. *Id.* at 92; see *id.* at 92-96. The court rejected the Gilardis' claim because the obligation to provide contraceptive coverage lies with Freshway Foods, not with the Gilardis in their individual capacities. *Id.* at 97-100.

b. After entering an injunction pending appeal, the court of appeals affirmed in part and reversed in part in a divided decision. See Pet. App. 1-76. The court rejected the RFRA claim asserted by Freshway Foods. *Id.* at 7-16. The court concluded that Freshway Foods, a "secular corporation[]," *id.* at 14, is not a person engaged in the exercise of religion within the meaning of RFRA, *id.* at 7-16. The court explained that this Court's pre-RFRA cases treated free-exercise rights as confined to individuals and religious organizations and did not extend such rights to secular corporations. *Id.* at 10-14. The court also rejected the contention that Freshway Foods "may serve as the owners' surrogate," *id.* at 14, noting that this argument rests on a "misconception of religious associational standing." *Id.* at 16.

The court of appeals, however, accepted the RFRA claim asserted by the Gilardis. The court held that the contraceptive-coverage requirement substantially burdens the Gilardis' exercise of religion because it makes the Gilardis "complicit in a grave moral wrong." Pet. App. 21. The majority opined that the mandate "demands that owners like the Gilardis meaningfully approve and endorse the inclusion of

contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have." *Ibid.*

The court of appeals held that the contraceptive-coverage requirement is not narrowly tailored to advance compelling governmental interests because certain plans are not subject to the requirement, Pet. App. 30-32, and because Freshway Foods employees who are denied coverage of contraceptives will receive coverage for other services, such as "support for breastfeeding," "well-women visits," and "domestic violence" counseling, *id.* at 34. The court saw "nothing to suggest the preventive-care statute would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement." *Ibid.*

The court of appeals reversed the district court's denial of a preliminary injunction in favor of the Gilardis and remanded for consideration of the other preliminary injunction factors. Pet. App. 34-35. The court affirmed the district court's denial of a preliminary injunction with respect to Freshway Foods. *Id.* at 35.[5]

Judge Edwards dissented from the ruling in favor of the Gilardis. He rejected the contention that the contraceptive-coverage requirement substantially burdens the Gilardis' exercise of religion, reasoning that the requirement "does not regulate the Gilardis; it regulates their *companies*," so that "the Mandate requires nothing of the Gilardis, save what is required of any managers of business operations subject to

---

[5] Judge Randolph concurred in part and in the judgment, stating that he would not have decided whether the corporations state a claim under RFRA. Pet. App. 35-37.

federal law." Pet. App. 68. He explained that the mandate does not require the Gilardis to "facilitate Freshway's employees' use of contraceptives any more directly than they do by authorizing Freshway to pay wages." *Ibid.* He noted that, under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, the Freshway Foods plan is a legal entity, distinct from the Freshway Foods corporations and operated by a third-party administrator, and that, under health privacy regulations, the Gilardis are prohibited from being informed about whether employees use their health coverage for contraceptives. Pet. App. 66.

Judge Edwards also concluded that petitioners' demand for a religious exemption would fail even if the contraceptive-coverage requirement were subject to strict scrutiny. He explained that allowing "religious exemptions to for-profit, secular corporations would undermine" the Affordable Care Act's "universal coverage scheme: If the Gilardis' companies were exempted from covering contraception, another corporation's owners might just as well seek a religious exemption from covering certain preventative vaccines" or other health services. Pet. App. 70-71. He noted that such exemptions would dwarf the limited exemption that the regulations authorize for religious employers, *id.* at 72-73, and he explained that, under *United States* v. *Lee,* 455 U.S. 252, 261 (1982), a commercial employer is not entitled to an exemption that comes at the expense of its employees. Pet. App. 75. Judge Edwards emphasized that, in contrast to a church, petitioners "use labor *to make a profit*, rather than to perpetuate a religious values-based mission." *Ibid.* (emphasis in original). He concluded that the

Gilardis "cannot voluntarily capitalize on labor but invoke their personal religious values to deny employees the benefit of laws enacted to promote employee welfare." *Id.* at 76.[6]

4. On November 26, 2013, this Court granted the government's petition for a writ of certiorari in *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-354, and private parties' petition for a writ of certiorari in *Conestoga Wood Specialties* v. *Sebelius*, No. 13-356, both of which present the same question at issue here.

DISCUSSION

Petitioners contend that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which they are otherwise entitled by federal law, based on the religious objections of the corporation's owners. That question is pending before the Court in *Sebelius* v. *Hobby Lobby Stores, Inc.*, cert. granted, No. 13-354 (Nov. 26, 2013) (*Hobby Lobby*), and *Conestoga Wood Specialties Corp.* v. *Sebelius*, cert. granted, No. 13-356 (Nov. 26, 2013) (*Conestoga Wood*). There is no need to grant the certiorari petition in this case to consider that same question.

Plenary review based on this certiorari petition would be particularly unwarranted given that the court of appeals ruled *in favor* of the Gilardis on their

---

[6] The court of appeals ordered a remand to allow the district court to consider the other factors that bear on issuance of a preliminary injunction. Pet. App. 34-35. Petitioners moved in the D.C. Circuit to stay the issuance of the mandate and to continue the injunction pending appeal, pending the disposition of this petition for a writ of certiorari. The government did not oppose that motion, which remains pending as of December 5, 2013.

individual RFRA claims. See Pet. App. 16-35; see also Pet. 19 n.10. Indeed, the government intends to file its own petition for a writ of certiorari with respect to the judgment below. The government will ask that its petition be held for *Hobby Lobby* and *Conestoga Wood*. While there is no basis for plenary review in this case, the government believes that the petition for a writ of certiorari here should likewise be held pending a decision on the merits in *Hobby Lobby* and *Conestoga Wood*. The Court may then dispose of the petition as appropriate in light of the Court's decision in those cases.

CONCLUSION

The Court should hold the petition in this case pending the disposition of *Sebelius* v. *Hobby Lobby Stores, Inc.*, cert. granted, No. 13-354 (Nov. 26, 2013), and *Conestoga Wood Specialties Corp.* v. *Sebelius*, cert. granted, No. 13-356 (Nov. 26, 2013), and then dispose of it as appropriate in light of the Court's decision in those cases.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

DECEMBER 2013