Nos. 13-354 & 13-356

In The Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

BRIEF OF NATIONAL ASSOCIATION OF EVANGELICALS AS AMICUS CURIAE SUPPORTING HOBBY LOBBY AND CONESTOGA, ET AL.

CARL H. ESBECK
UNIVERSITY OF MISSOURI
SCHOOL OF LAW
820 Conley Road
Columbia, MO 65211
(573) 882-6543

TIMOTHY BELZ
Counsel of Record
OTTSEN, LEGGAT & BELZ, L.C.
112 S. Hanley, Ste. 200
St. Louis, MO 63105
(314) 726-2800
tbelz@omlblaw.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This brief addresses the constitutionality under the Establishment Clause of a RFRA accommodation that might place the cost of emergency contraception on employees rather than accommodated employers, and if there is a shifting of cost from employers to employees, whether such a shift constitutes a compelling governmental interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

NAE believes that religious freedom fully makes sense only on the premise that God exists, and that God's character and personal nature are such as to give rise to human duties that are prior and superior in obligation to the commands of civil society. NAE also holds that religious freedom is God-given, and therefore the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part. No party, party's counsel, or other person, other than *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

An argument for rejecting an accommodation for Conestoga Wood Specialties Corporation and Hobby Lobby Stores, Inc., under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* (2006), is that one consequence might be that their employees will have to pay for their own emergency contraception. The claim has a certain emotional appeal. But the argument is mistaken, as is evident upon resort to the everyday business of statutory interpretation, congressional intent, and constitutional principles.

The government's way of framing the argument is that the sought-after RFRA exemption will shift the cost of emergency contraception from a closely held business to its employees and their families. The government's *amici* argue that the shift-of-burden, if allowed, would violate the Establishment Clause. The government argues that preventing the cost-shift from taking place contributes to the government's compelling interest in rejecting a RFRA accommodation. The arguments are wrong, both conceptually and legally.

1. Rightly understood, there is no shift of benefit from employer to employee. Effective January 1, 2013, the Affordable Care Act ("ACA") imposed a regulatory burden on Conestoga and Hobby Lobby that included the cost of providing emergency contraception to their employees. On that same day, the employees became recipients of a statutory entitlement.

A RFRA exemption, however, will return Conestoga and Hobby Lobby back to where matters started. The result is no change.

2. Assuming, arguendo, that there is a relevant shift in costs from employer to employee, that shift does not violate the Establishment Clause. The ACA imposes a number of regulatory burdens on employers. RFRA is a command by Congress to refrain from imposing those regulatory burdens on sincere religious claimants. The operative legal principle is that government does not establish a religion by leaving it alone.

Over a half dozen cases decided by this Court have already upheld the constitutionality of statutory religious exemptions. In most of these cases there was burden-shifting to third parties, but the shift made no difference in the outcome. In the one case where this Court did strike down a state statute accommodating religion, the statute created an absolute right to an accommodation, thereby compelling a private-sector employer to act in conformity with a religious tenet of one employee, and ignored the competing interests of other employees and the employer. RFRA suffers from neither infirmity.

3. Again, assuming arguendo that there is a relevant shift in costs from employer to employee, preventing that shift is not a compelling interest of the government excusing a RFRA accommodation for Conestoga and Hobby Lobby. The government carries the burden of producing evidence on the question of

the government's compelling interests sufficient to override RFRA, and on the factual record in these two appeals it has failed that burden.

The government cannot unilaterally assert a need for a health care system that is "comprehensive," meaning without exceptions, because in enacting RFRA Congress has already spoken in favor of case-by-case accommodations for sincere religious claimants. Unlike a total exemption from the federal income tax system for those claiming a religiously informed conscientious objection to how general tax revenues are being spent by the government, the RFRA accommodations sought by Conestoga and Hobby Lobby are small in nature and amount. The accommodations do not come anywhere close to defeating the functioning of the entire ACA.

ARGUMENT

I. Accommodating Closely Held Business Employers Under RFRA Does Not Violate the Establishment Clause.

Although the government has not argued that RFRA violates the Establishment Clause, we anticipate that its *amici* will.[2] Such an argument immediately

[2] *See*, *e.g.*, Frederick Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev.

(Continued on following page)

strikes one as overreaching. If correct, it would mean that Congress, or an Administration more willing to protect the free exercise of religion, could not exempt enterprises such as Conestoga and Hobby Lobby from the contraception mandate even if Congress or the Administration wanted to.[3] The argument is wrong both conceptually and legally.

A. RFRA Exemptions Shift No Cognizable Burden to Employees.

The first question is who is burdening whom. The employers in these cases do not seek to force their employees to live by the employers' moral and religious commitments. Conestoga and Hobby Lobby do not seek to legally bar their employees from purchasing abortifacient drugs and devices using their own funds or other resources.

(forthcoming Apr. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328516 (Jan. 24, 2014).

[3] Those who make the Establishment Clause argument claim that it would be unconstitutional to exempt religious nonprofit and for-profit organizations, except for churches and their integrated auxiliaries. *Id.* at 45. They want to avoid arguing that it is unconstitutional as to churches, for that is too improbable. So they indulge in speculation about the contraceptive use by employees of churches who teach that contraception, or emergency contraception, is morally prohibited. *Id.* at 44 (unfounded speculation that employees of such churches "are overwhelmingly likely to share their anti-contraception views"). *See also*, *id.* at 45 (unfounded speculation that many employees of nonprofit religious organizations that are not churches do not share their employer's views on contraception).

The government *does* seek to legally force the employers to conform to its moral values. It would make the employers pay, with their own funds, for an earmarked employee benefit – a prepaid right to drugs and devices that the employers believe act as abortifacients. It is not even the case that the employers are buying a menu of benefits that the employee could spend *either* on these drugs and devices *or* on some other medical benefit. Because the ACA eliminates coverage limits,[4] spending on emergency contraception does not reduce the other benefits available under the health care plan. The employers are asked to prepay for whatever contraceptive drugs are thought by the government to be beneficial for their employees.

In many contexts, this Court has held that a mere failure to pay for some good or service is generally not a cognizable burden on a person who desires that good or service. Most akin to the matter here, the Court has held that a state's discriminatory refusal to pay for scholarships for theology majors imposed no cognizable burden on the religious exercise of theology majors. "The State has merely chosen not to fund a distinct category of instruction." *Locke v. Davey*, 540 U.S. 712, 721 (2004). The Court has acted similarly with respect to free speech, *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991), and abortion, *Harris v.*

[4] 42 U.S.C. § 300gg-11(a)(1) (Supp. V 2011).

McRae, 448 U.S. 297, 311-18 (1980); *Maher v. Roe*, 432 U.S. 464, 471-74 (1977).

Under the ACA, effective January 1, 2013, the government imposed a regulatory burden on all employers of more than fifty persons, and it conferred a corresponding benefit on their employees. If two of those employers now invoke the congressionally enacted RFRA seeking an accommodation, it removes the burden on the employers and takes the benefit from the employees. The net effect of the two governmental actions is no cognizable burden on anyone, economically or religiously. The employers and employees are back to where they started. To consider one of these actions without considering the other, as the government's *amici* do, is to ignore the context in which this dispute arises.

Gedicks & Van Tassell, *supra*, note 2, claim that the controlling baseline should be 1993, which is when RFRA was enacted by Congress. *Id.* at 34-35. But that choice is contrary to *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In *Amos*, the baseline was on the eve of the effective date of Title VII of the Civil Rights Act of 1964, which was when a regulatory burden was first imposed on religious employers. Congress amended Title VII in 1972 so as to lift the relevant burden from religious employers. *Id*. at 332 n.9. Accordingly, the 1972 amendment is the parallel to RFRA here. In *Amos*, it was the 1972 amendment that was attacked as violative of the Establishment Clause (*id*. at 335-37), and here it is RFRA that is subjected to the same

constitutional challenge by Gedicks & Van Tassell. The ACA is the parallel to Title VII when first enacted in 1964. Both legislative acts altered the *status quo ante* from no regulatory burden to imposing such a burden. So in a "before and after" comparison, the circumstances on the eve of the ACA and the 1964 Title VII are the "before," which is to say they are the baseline for comparing later events. That was the approach of the *Amos* Court. *Id*. at 337 ("[W]e find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964.").

B. RFRA's Application to a Closely Held Business Employer Does Not Create an Unyielding Preference for Religion in Violation of the Establishment Clause.

When government burdens the religious exercise of an individual or organization, it is free to lift that burden by enacting a religious exemption without violating the Establishment Clause. The leading case is *Amos*, in which the Court upheld a statutory exemption in Title VII, 42 U.S.C. § 2000e-1(a) (2006), that permits religious organizations to prefer employees of like-minded faith. 483 U.S. at 332 n.9. Mayson, a building custodian employed at a gymnasium operated by the Church of Jesus Christ of Latter-day Saints, was discharged when he ceased to be a church member in good standing. The Court began by reaffirming that the Establishment Clause did not mean

that government must be indifferent to religion, but aims at government not "act[ing] with the intent of promoting a particular point of view in religious matters." *Id*. at 335. The Title VII exemption, however, was not an instance of government "abandoning neutrality," for "it is a permissible legislative purpose to alleviate" a regulatory burden leaving religious organizations free "to define and carry out their religious missions." *Id*. The organizing principle is that government does not establish religion by leaving it alone.

In addition to *Amos*, the Court has on five other occasions turned back an Establishment Clause challenge to a religious exemption.[5] If one focuses only on the narrow consequence, in all of these cases there was a shift in burden to others, sometimes

[5] *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prison inmates, does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (religious exemption from military draft for those opposing all war does not violate Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemption for religious organization does not violate Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306 (1952) (release from compulsory education law to enable students to attend religion classes off public school grounds does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft exemption for clergy does not violate Establishment Clause).

great and sometimes small. But the shifting burden never altered the result.[6]

It is true that if Conestoga and Hobby Lobby prevail in this litigation, then their employees might end up paying for their own Plan B or Ella. So there is no denying that there might be a modest shift of burden – or, more precisely, a shift of the pharmaceutical cost back to the employee where the burden originally lay before the government imposed the contraception mandate. But lifting a government-imposed burden from a rights holder will frequently mean that the burden falls elsewhere. That is a necessary implication of the First Amendment, as well as RFRA.

1. *Thornton* is distinguishable.

In only one of this Court's religious exemption cases has a shift in burden been a factor in determining that the Establishment Clause was violated. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985),

[6] We expect the government's *amici* will argue that when the shift in burden is to identifiable third parties it is more concerning, whereas there is little problem when the burden is diffused among many and thus those incurring it are not easily identified. That might make a difference for standing, but it is surely irrelevant to the Establishment Clause. The focus of no-establishment is on whether government has transgressed the boundary between church and government. If it has, it is of little moment that the resulting burden falls on a known few or is spread over a wide population.

entailed multiple considerations, however, and was not decided solely on the shifting of a burden from a religious claimant to others.

In *Thornton*, Connecticut had amended its laws to permit more retail stores to be open on Sunday. Out of concern for those who would now be pressured to work on their Sabbath, the state adopted a law to help employees who desired to remain observant. The statute read: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day." *Id*. at 706. Donald Thornton was an employee for Caldor, Inc., a department store. He was a Presbyterian and observed Sunday as his Sabbath. When Caldor began opening on Sunday, Thornton worked Sundays once or twice a month. He later invoked the Connecticut statute. Caldor resisted and a lawsuit was filed on Thornton's behalf by the State Board of Mediation. *Id*. at 705-07. Caldor argued that the Connecticut statute violated the Establishment Clause, and this Court agreed. *Id*. at 707, 710-11.

Thornton noted that the "statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath." *Id*. at 709 (footnote omitted). The statute failed to account for what an employer was to do "if a high percentage of an employer's workforce asserts rights to the same Sabbath." *Id*. Hence, the law granted an "unyielding weighting in favor of Sabbath observers over all other interests." *Id*. at 710. For example, coworkers with more seniority may want

weekends off because those are the same days a spouse is not working. *Id*. at 710 n.9. All this was problematic "[u]nder the Religion Clauses," the Court reasoned, not because of cost-shifting, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id*. at 708. It was not the money as such, but that Caldor was being compelled to act in the name of Thornton's conviction about keeping the Sabbath holy.

The Court also noted that Thornton's religious burden was caused by the demands of the private retail sector. The Connecticut law, in response to the anticipated demands, empowered Thornton to call on the state's assistance to secure the observance of his Sabbath. *Id*. at 709. *Thornton* is thus unlike *Amos*, the latter an exemption that merely lifted a government burden that was imposed by that same government. The Connecticut statute, in contrast, spurred government into taking a side as between two disputants. It did so by arming Thornton with an affirmative legal right against others in the private sector.

It was in this context that the Court in *Thornton* said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id*. at 710 (internal citations and quotations omitted). Clarification concerning the reach of this "fundamental principle" was needed and

quickly came in two cases decided just two years later.[7]

The first was *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987). *Hobbie* was the third occasion for this Court to rule on the application of the Free Exercise Clause to an employee seeking benefits under a state's unemployment compensation law.[8] On each of these occasions, the state had denied benefits because the worker declined to take a job for which she was qualified. In *Hobbie*, the employee was discharged when she refused to work on Saturday, her Sabbath.

With a nod to *Thornton*'s "fundamental principle," the employer in *Hobbie* argued that to compel accommodation of an employee's Sabbath entailed a shift in burden to the employer and coworkers contrary to the Establishment Clause. *Id.* at 145. This Court rejected the argument:

> In *Thornton*, we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly

[7] It is not even clear whether the *Thornton* Court was attributing this "fundamental principle" to the Free Exercise Clause or the Establishment Clause. If the attribution was to the Free Exercise Clause, then the passage is simply irrelevant to the argument here that no-establishment principles are implicated.

[8] *See Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

> advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.

Hobbie, 480 U.S. at 145 n.11 (internal citations omitted; brackets in original). *Hobbie* thus showed how narrow *Thornton* was. In lifting a religious burden, the statutory accommodation in *Thornton* favored the religious claimant unyieldingly, thus entirely disregarding the interests of the employer and coworkers. That is not the case with RFRA, which entails a balancing test familiar to free exercise law that takes into account the interests of others.

A few months later, the *Amos* Court addressed the scope of the "fundamental principle" passage in *Thornton*. In *Amos*, a religious exemption in Title VII permitted religious organizations to prefer those of like-minded faith. Mayson, a building custodian, claimed the statutory exemption shifted a burden to him resulting in loss of employment. Tracking the *Thornton* passage, Mayson argued that the exemption pressured him to conform his conduct to the religious necessities of others contrary to the Establishment Clause. This Court disagreed:

> Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . , and not the Government, who put him to the choice of changing

> his religious practices or losing his job. This is a very different case than *Estate of Thornton v. Caldor, Inc.*. . . . In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. *See Hobbie* . . . 480 U.S. [at] 145 n.11.

Amos, 483 U.S. at 337 n.15.

The Court thus distinguished *Thornton* from *Amos* on two counts, and the case here is like *Amos*. First, in *Amos* the religious exemption had the government merely lifting a burden on the LDS Church that the government imposed on others. What the church did with that freedom was the responsibility of the church not the government. *Thornton* was different: the religious exemption there had the government intervening in the dispute and taking the side of the religious claimant against others in the private sector. RFRA, on the other hand, merely lifts a burden on religion that the Federal government has imposed. Second, the statute in *Thornton* favored the religious claimant unyieldingly, thus totally disregarding the interests of others. As said above in the context of *Hobbie*, RFRA is not unyielding but does interest balancing.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the religious exemption was by operation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*., at a state correctional facility. *Cutter* involved a religious exemption of Federal origin that was being used to intervene in a dispute by taking the side of the inmate against State authorities. In one respect *Cutter* resembled *Thornton*, namely, there were two parties disputing over a religious practice (inmate and State) and the Federal government had adopted a law (RLUIPA) that took the side of the religious claimant. As a consequence, the Court in *Cutter* gave a warning about shifting burdens from the religious claimant to other inmates or to the State. *Id*. at 722, 726 (dictum collecting factors to consider, one of which is burden shifting). Notwithstanding, this Court held that given RLUIPA's "tak[ing] adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries," the statute met the strictures of the Establishment Clause. *Id*. at 720. Because RLUIPA was not unyielding to third-party considerations, a unanimous Court upheld its constitutionality. RLUIPA is parallel to RFRA, as the next case demonstrates.

In this Court's most recent encounter with RFRA, the government argued that it had satisfied its burden under the compelling interest test by arguing there was a need for uniform application of a controlled substances statute. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418,

435-36 (2006). That argument was rejected because that is not how RFRA operates. Rather, under RFRA the judiciary is charged with striking "sensible balances" that often lead to religious accommodations. RFRA assumes "the feasibility of case-by-case consideration of religious exemptions." *Id*. at 436 (referencing *Cutter*). The *O Centro* Court noted how RLUIPA and RFRA operate alike. *Id*. (RLUIPA claimants "seek religious accommodations pursuant to the same standard as set forth in RFRA"). And both RLUIPA in *Cutter* and RFRA in *O Centro* avoided implicating the Establishment Clause by their case-by-case interest balancing, as opposed to the "unyielding preference" statute struck down in *Thornton*.

From *Hobbie*, *Amos, Cutter*, and *O Centro* we have two distinct factors that set *Thornton* apart. First, the religious exemption in *Thornton* created an "unyielding preference" for religion. Second, the religious exemption had Connecticut vesting the religious claimant with a new legal right against competing private-sector interests. *Thornton* was not a case where the exemption merely lifted a government-imposed burden. Only when both factors occurred together, as they did in *Thornton*, did they bring down the Connecticut statute.

Neither factor identified in *Thornton* is present here. RFRA creates no unyielding preference for religion, but sets up the familiar interest-balancing calculus of free exercise law. And RFRA operates to merely lift a burden on religion that the same Federal government has imposed elsewhere by regulation.

Accordingly, the Establishment Clause is not remotely triggered by the RFRA exemptions afforded Conestoga and Hobby Lobby.

2. The Establishment Clause operates categorically, not as an invitation for the interest-balancing used by *amici* for the government.

The Establishment Clause argument by the government's *amici* overreaches in another sense. From the outset, the government has conceded that for reasons of religious freedom churches and their integrated auxiliaries should be exempt from the contraception mandate. But a woman working for a church suffers the same burden-shifting loss, as *amici* characterize it, as does a woman working for Conestoga or Hobby Lobby. To avoid that comparison, *amici* for the government press their argument hardest when it comes to business entities with many employees. *See*, *e.g.*, Gedicks & Van Tassell, *supra*, note 2, at 38-42. But there is no principled basis for doing so. The issue is not how large is the total dollar amount of a given shift in pharmaceutical costs, for the Establishment Clause operates categorically rather than as a balancing test. That means the religious exemption in question either breaches the wall between church and government because there is something wrong in principle about shifting a burden or it does not.

The government's *amici* agree that the Establishment Clause is "a structural bar on government action rather than a guarantee of personal rights. [Thus, v]iolations . . . cannot be . . . balanced away by weightier private or government interests, as can violations of the Free Exercise Clause." *Id*. at 6-7. However, they seem not to realize that a structural Establishment Clause undermines their core thesis which is that at some point the cost-shifting becomes so great that "the scales tip" against a religious exemption's validity under that Clause. *Id*. at 27-30. As if the case law under the Establishment Clause was not complex enough, these *amici* would turn the clause into an occasion for *Lochner*-era interest balancing. *Id*. at 38-42 (a little economic cost-shifting is constitutionally valid, but at some juncture a Federal judge is to somehow know when too many dollars tote up to the "tipping point" against RFRA).[9]

In the few cases that have paid attention to burden shifting, such as *Thornton*, the Court did so because the law in question granted an "unyielding

[9] How is it that the Establishment Clause operates categorically? When the clause is structural it negates power that otherwise might be thought to have been delegated to government. It denies power to "make . . . law respecting an establishment," thereby separating church and government. U.S. CONST., Amend. I. As with power-delegating and power-negating clauses generally, when the negative on power that is the Establishment Clause is exceeded, there is no balancing. Either the government has exceeded its power or it has not, much as with a federal court's subject matter jurisdiction.

weighting in favor of [religious] observers over all other interests." 472 U.S. at 710. And such a shift in burden was problematic "[u]nder the Religion Clauses," not because of the total dollars involved in the shift, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id*. at 708. So it was not the money as such, but that a private-sector employer, a department store, was being compelled by the state to act in the name of someone else's religion. The *Thornton* Court thought that set of facts had the "primary effect" of advancing "a particular religious practice." *Id*. at 710. A party being compelled by an unyielding law to act in the name of another's religious creed is something a categorical Establishment Clause can, in the right case, get its teeth into, unlike the balancing test engaged in by the government's *amici*.

II. There Is No Compelling Interest in Preventing the Cost of Contraceptives from Being Shifted to Employees.

A RFRA claim can be defeated by a showing of "a compelling governmental interest" that is the "least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b). The government argues that the Federal government has a compelling interest in employer-provided preventive health care services being part of a "comprehensive insurance system," a goal disrupted by RFRA shifting some contraceptive costs from employer to employees. Brief for the Petitioners 38-42, No. 13-354.

For the government to assert an interest in a "comprehensive" health insurance system is similar to the government's defense in *O Centro*, 546 U.S. at 435-36, to have an interest in a "uniform" controlled substances law. The Court rejected that argument in *O Centro*, not because there was no such governmental interest but because the argument misconceives how RFRA works. Under RFRA, Congress has instructed the judiciary to strike "sensible balances" that often lead to exemptions. The Act assumes "the feasibility of case-by-case consideration of religious exemptions." *Id*. at 436. For the government to therefore insist on "uniformity" or "comprehensiveness" is a non-starter with Congress. Rather, the government has to meet its burden of proving that the "comprehensiveness" it desires is objectively compelling.[10] Given the factual record in this appeal, it has failed that burden.

The government claims that it is "compelling" to prevent the shifting of the cost of emergency contraception from Conestoga and Hobby Lobby to their employees. There are multiple reasons why this is not true. First, as pointed out in Part I.A., *supra*, there has been no net shift in the relevant costs. Effective January 1, 2013, the contraception mandate would have shifted the costs to the employer, but the

[10] The government carries the burden of producing evidence on the question of its compelling interests. 42 U.S.C. § 2000bb-2(3).

employer's RFRA exemption prevents that shift from occurring. The result is no change.

Second, the cost of emergency contraception is not large. And until January 1, 2013, there was no Federal entitlement vested in the employees to have preventive reproductive health care including emergency contraception. It makes no sense to claim that something that did not exist until January 1, 2013, is suddenly compelling. Common sense tells us it is not.

Third, the Federal government has an array of "less restrictive means" of relieving the employees of certain pharmaceutical costs, all while leaving the employer's religious practices unburdened. RFRA requires that these means be actively pursued by the government in good faith. Until it does so, the government has not met all of the burdens it carries under RFRA.

Fourth, the government draws our attention to a passage in *United States v. Lee*, 455 U.S. 252, 261 (1982), to the effect that the cost-shifting sought there would operate to impose the employer's faith on his employees. Brief for the Petitioners 39, No. 13-354. In *Lee*, an Amish claimant sought to be exempt from paying the employer's payroll tax to the Social Security Administration for all of his employees. But what Conestoga and Hobby Lobby ask for has no such drastic an impact on the ACA. Rather, they ask only to be relieved of a very small part of the ACA's coverage, *i.e.*, emergency contraception, while continuing to bear their overall obligation to provide a health

care plan for their employees. To put it bluntly: even if they should prevail in this litigation, Conestoga and Hobby Lobby will be paying out millions of dollars as they meet their ACA obligations to their employees. The thrust of *Lee* was that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." 455 U.S. at 260. But what the employer was asking for in *Lee* is nowhere close to the situation with Conestoga and Hobby Lobby. The requested accommodation here is narrowly focused on emergency contraception. The ACA's vast health care system will function nicely should Conestoga and Hobby Lobby prevail in this litigation. On the other hand, if the government's argument is that to exempt these two employers means that it will get requests to accommodate yet additional RFRA claimants and therefore it has a compelling interest in granting no accommodations, that "slippery slope" rejoinder has already been rejected in *O Centro*, 546 U.S. at 435-36.

The government cannot unilaterally insist that the ACA be devoid of exceptions because it is "comprehensive." Under RFRA, the government carries the burden of stepping up to accommodate these two employers. On this record, there is no evidence it has begun to do so.

CONCLUSION

The government and some of its *amici* advance various arguments that a RFRA accommodation for Conestoga and Hobby Lobby would mean that their employees will be responsible for the cost of any emergency contraception. Those arguments are mistaken, both in believing that there is a relevant shift in costs, and in attributing any merit to its legal significance.

This Court should order the government to recognize a RFRA accommodation for Conestoga and Hobby Lobby.

Respectfully submitted,

CARL H. ESBECK
UNIVERSITY OF MISSOURI
SCHOOL OF LAW*
820 Conley Road
Columbia, MO 65211
(573) 882-6543

TIMOTHY BELZ
Counsel of Record
OTTSEN, LEGGAT & BELZ, L.C.
112 S. Hanley, Ste. 200
St. Louis, MO 63105
(314) 726-2800
tbelz@omlblaw.com

Counsel for Amicus Curiae

January 27, 2014

---

* The university is listed only for purposes of identification. It takes no position on this matter.