No. 13-591

In the Supreme Court of the United States

EDEN FOODS, INC., ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS

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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 owner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 733 F.3d 626. The opinion of the district court (Pet. App. 19-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2013. The petition for a writ of certiorari was filed on November 12, 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 employer-sponsored group health plan. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & Tbl. 1-1 (2008). The cost of such coverage is typically covered

by a combination of employer and employee contributions, *id.* at 4, with the employer's share serving as "part of an employee's compensation package," *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 91 (4th Cir.) (citation omitted), cert. denied, 134 S. Ct. 683 (2013). The federal government subsidizes group health plans through favorable tax treatment. 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.

Congress has established certain minimum coverage standards for group health plans. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 29 U.S.C. 1185; 42 U.S.C. 300gg-4; see 26 U.S.C. 9811. In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 29 U.S.C. 1185b; 42 U.S.C. 300gg-6.

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] Congress provided for additional minimum standards for group health plans and health insurers offering coverage in the group and individual markets.

a. 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-services coverage provision). This provision applies to (among other types of health coverage) employment-based group

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

health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, see 29 U.S.C. 1185d (Supp. V 2011), and it can thus be enforced by plan participants and beneficiaries pursuant to ERISA's enforcement mechanisms. See 29 U.S.C. 1132(a)(1)(B) and (3).[2]

"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.

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[2] The Secretary of Labor may likewise bring an ERISA enforcement action with respect to such a group plan. 29 U.S.C. 1132(a)(5). The preventive-services coverage provision is also enforceable through the imposition of taxes on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834. (Payment of such a tax by an employer, however, would not relieve a plan of its legal obligation to cover recommended preventive-health services without cost sharing, which would remain as a freestanding ERISA requirement for such group health plans, see 29 U.S.C. 1185d (Supp. V 2011).) In addition, with respect to health insurers in the individual and group markets, States may enforce the Act's health insurance market reforms, including the preventive-services coverage provision. 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 monetary 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).

To address this problem, the Act and its implementing regulations require coverage of a wide range of preventive services without cost, including services such as cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure, 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011); see 75 Fed. Reg. 41,741-41,744 (July 19, 2010); routine vaccination to prevent vaccine-preventable diseases, such as measles and tetanus, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011); see 75 Fed. Reg. at 41,740, 41,745-41,752; and "evidence-informed preventive care and screenings" for infants, children, and adolescents, 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011); see 75 Fed. Reg. at 41,753-41,755.

Further, and as particularly relevant here, the Act requires coverage, "with respect to women, [of] such additional preventive care and screenings * * * as provided for in comprehensive 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)(4) (Supp. V 2011). Congress included this provision because "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 such comprehensive guidelines for preventive services for women, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8725-8726 (Feb. 15, 2012); IOM Report 1-2. 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 the Institute's review of the evidence, it 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 access to 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 all 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*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Aug. 27, 2013) (*Birth Control Guide*).

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies can have adverse health consequences for both mothers and children. IOM Report 102-103. 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.

HRSA adopted women's preventive-health guidelines consistent with the Institute's recommendations, including a guideline recommending access to all FDA-approved contraceptive methods as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visted Jan. 14, 2014). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require non-grandfathered group health plans to cover, 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 provision).

b. The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of 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 provision that refers to churches, their integrated auxiliaries, 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 provide accommodations for the group health plans of religious nonprofit organizations that have religious objections to providing coverage for some or all contraceptive services. 45 C.F.R. 147.131(b). After such an organization accepts an accommodation, the women who participate in its plan will generally have access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations, under which the organization does not contract, arrange, pay, or refer for contraceptive coverage. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

c. The preventive-services coverage provision in general, and the contraceptive-coverage provision in particular, apply only if an employer offers a group health plan. Employers, however, are not required to offer group health plans. Certain employers with more than 50 full-time-equivalent employees are subject to a tax if they do not offer coverage, 26 U.S.C. 4980H, and they thus are afforded a choice between offering a group health plan and the prospect of paying the tax. See *Liberty Univ.*, 733 F.3d at 98; cf. *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2596-2597 (2012).

3. Petitioners are the for-profit corporation Eden Foods, Inc., (corporate-petitioner) and Michael Potter (individual-petitioner), who is the corporation's sole

shareholder. Pet. App. 8. Corporate-petitioner is "the oldest natural and organic food company in North America and the largest independent manufacturer of dry grocery organic foods." *Id.* at 42 (Compl., para. 35). Corporate-petitioner has 128 full-time employees, and they obtain health coverage through a group health plan issued by Blue Cross Blue Shield of Michigan. *Id.* at 41, 51 (Compl., paras. 23, 78). The plan currently covers contraceptives. *Id.* at 9.

Individual-petitioner is a Catholic who does "not believe that contraception or abortifacients are properly understood to constitute medicine, health care, or a means of providing for the well being of persons" and that "these procedures almost always involve immoral and unnatural practices." Pet. App. 46, 47 (Compl., paras. 51, 62). His "religious beliefs * * * prevent him from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients." *Id.* at 46 (Compl. para. 53).

In this suit, petitioners contend that the requirement that the Eden 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. 3. Specifically, petitioners contend that RFRA entitles the

Eden Foods plan to an exemption from the contraceptive-coverage provision. *Ibid.*[3]

a. The district court denied petitioners' motion for a preliminary injunction, holding that they had not established a likelihood of success on the merits. Pet. App. 19-34.

b. The court of appeals affirmed. Pet. App. 1-16. The court noted that after petitioners filed their notice of appeal it had decided *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), petition for cert. pending, No. 13-482 (filed Oct. 15, 2013). Pet. App. 12. The court explained that, "[l]ike the case presently before [it], *Autocam* involved claims by a for-profit, secular, incorporated business and the owners of that closely-held corporation." *Ibid.*

The court of appeals rejected corporate-petitioner's claim because "*Autocam* held that a for-profit corporation 'is not a "person" capable of "religious exercise" as intended by RFRA.'" Pet. App. 15. (quoting *Autocam*, 730 F.3d at 625). The court rejected individual-respondent's claim because "the *Autocam* opinion relied on basic, well-established principles of corporate law to hold that the individual owners/shareholders of Autocam had no standing" to challenge the regulation of the corporation. *Id.* at 12.

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

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[3] Petitioners also alleged claims under the First Amendment and Administrative Procedure Act, ch. 324, 60 Stat. 237, see Pet. App. 73-83, but they did not raise those claims on appeal.

are otherwise entitled by federal law, based on the religious objections of the corporation's owner. That question is pending before the Court in *Sebelius* v. *Hobby Lobby Stores, Inc.*, cert. granted, No. 13-354 (oral argument scheduled for Mar. 25, 2014) (*Hobby Lobby*), and *Conestoga Wood Specialties Corp.* v. *Sebelius*, cert. granted, No. 13-356 (oral argument scheduled for Mar. 25, 2014) (*Conestoga Wood*). For the reasons given in the government's opening brief in *Hobby Lobby* (at 15-58 (Jan. 10, 2014)), the court of appeals in this case correctly concluded that petitioners had not established a substantial likelihood of success on the merits of their RFRA claim. Given the clear overlap between this case and *Hobby Lobby* and *Conestoga Wood*, however, the Court should hold this petition for a writ of certiorari and dispose of it as appropriate in light of the Court's decision in those cases.

Petitioners incorrectly contend (Pet. 21-26) that a footnote in the court of appeals' opinion warrants this Court's plenary review. In that footnote in the "Factual and Procedural Background" portion of its opinion, the court of appeals quoted from comments individual-petitioner made to an on-line magazine suggesting he had a "laissez-faire, anti-government" motivation for his law suit. Pet. App. 8 n.3. The court of appeals' reference to that interview had no bearing on its holding, which was based instead on the legal principles set out in the *Autocam* decision. See *id.* at 12-16. Moreover, the court of appeals' brief mention of the interview was not a holding that the interview would be admissible at trial, so any "divergence" of opinion on the trial "admissibility of web postings" (Pet. 23) is not implicated here.

CONCLUSION

The Court should hold the petition for a writ of certiorari pending the disposition of *Sebelius* v. *Hobby Lobby Stores, Inc.*, cert. granted, No. 13-354 (oral argument scheduled for Mar. 25, 2014), and *Conestoga Wood Specialties Corp.* v. *Sebelius*, cert. granted, No. 13-356 (oral argument scheduled for Mar. 25, 2014), and then dispose of it as appropriate in light of the Court's decision in those cases.

Respectfully submitted.

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