

1 argument before the Supreme Court of the United States
2 at 10:11 a.m.

3 APPEARANCES:

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in consolidated cases Number 13-354,
5 Sebelius, Secretary of Health and Human Services v.
6 Hobby Lobby Stores; and 13-356, Conestoga Wood
7 Specialties Corporation v. Sebelius.

8 Mr. Clement.

9 ORAL ARGUMENT OF PAUL D. CLEMENT
10 ON BEHALF OF THE PRIVATE PARTIES

11 MR. CLEMENT: Mr. Chief Justice, and may it
12 please the Court:

13 When a Federal Government agency compelled
14 employers to provide something as religiously sensitive
15 as contraception, it knew that free exercise in RFRA
16 claims would soon follow.

17 In particular, the agency itself provided
18 exemptions and accommodations for the religious exercise
19 of a subset --

20 JUSTICE SOTOMAYOR: Is your claim limited to
21 sensitive materials like contraceptives or does it
22 include items like blood transfusion, vaccines? For
23 some religions, products made of pork? Is any claim
24 under your theory that has a religious basis, could an
25 employer preclude the use of those items as well?

1 MR. CLEMENT: Well, Justice Sotomayor, the
2 first step in the analysis would be to ask whether or
3 not there's a substantial burden on religious exercise.
4 I do think this case is, in a sense, easier than most of
5 the examples that you've brought up because here's one
6 where it's so religiously sensitive, so fraught with
7 religious controversy, that the agency itself provides a
8 certain number of exemptions and accommodations. So
9 that's one way, I think, that you'd address the first
10 step of the question here.

11 JUSTICE KAGAN: Well, I mean, just take one
12 of the things that Justice Sotomayor asked about, which
13 is vaccinations, because there are many people who have
14 religious objections to vaccinations. So suppose an
15 employer does and -- and refuses to fund or wants not to
16 fund vaccinations for her employees, what -- what
17 happens then?

18 MR. CLEMENT: Well, if we assume we get past
19 the substantial burden step of the analysis, then the
20 next step of the analysis is the compelling interest and
21 least restrictive alternatives analysis. And every case
22 would have to be analyzed on its own. I do think in the
23 context of vaccinations, the government may have a
24 stronger compelling interest than it does in this
25 context because there are notions of herd immunity and

1 the like that give the government a particularly
2 compelling interest in trying to maximize the number --

3 JUSTICE KAGAN: Blood transfusions?

4 MR. CLEMENT: Blood transfusions. Again,
5 each one of these cases, I think would have to be
6 evaluated on its own and apply the compelling
7 interest-least restrictive alternative test and the
8 substantial burdens part of the test.

9 JUSTICE KAGAN: So really, every medical
10 treatment. And Justice Sotomayor is quite right that
11 there are quite a number of medical treatments that
12 difference religious groups object to. So one religious
13 group could opt out of this and another religious group
14 could opt out of that and everything would be piecemeal
15 and nothing would be uniform.

16 MR. CLEMENT: Well -- well, Justice Kagan,
17 nothing could be clearer than when Congress passed RFRA
18 Congress made a judgment that RFRA was going to apply to
19 all manner of Federal statutes. And I think what the
20 Congress --

21 JUSTICE GINSBURG: Mr. Clement, maybe it
22 seemed clear then, but since RFRA, just as before RFRA,
23 Congress has continued to write into Federal legislation
24 specific religious exemptions for some, but not
25 everybody, for individuals, sometimes religious

1 institutions. So if it was all that clear that RFRA
2 took care of it all, why did Congress continue after
3 RFRA to pass these laws focusing the exemption on an
4 individual, religious institution? Those, as I take
5 your argument, all of those laws -- and there are more
6 than half a dozen -- were unnecessary. Once RFRA was on
7 the books, Congress didn't have to do that any more.

8 MR. CLEMENT: Well, Justice Ginsburg, I'm
9 not sure that they were all unnecessary. And of course,
10 in a variety of contexts, Congress may proceed on a belt
11 and suspenders matters. So I think there's really two
12 different questions. One is when Congress passed RFRA,
13 was RFRA just done with creating other exemptions. And
14 I think the answer to that is no. But I think the
15 question that Justice Kagan's question brought up is,
16 was Congress evident and did Congress specifically
17 consider whether RFRA would apply across the board to
18 all the provisions of 18 U.S.C., or rather all the
19 provisions of the United States Code. And Congress
20 could not have been clearer that it was passing a
21 statute that it wanted to apply to all preexisting
22 statutes and to all subsequent statutes unless Congress
23 specifically provided otherwise.

24 JUSTICE KENNEDY: You were beginning by
25 giving us a framework for your argument. Do I think of

1 this as a statutory case? Of course, the First
2 Amendment is on the stage at some point here, but I take
3 it you can prevail just on the question of statutory
4 interpretation, and if that is so, are there any
5 statutory rules that work in your favor, that is to say,
6 avoiding a constitutional question or how do we think
7 about this case, primarily as a statutory case?

8 MR. CLEMENT: Obviously, one of my clients
9 has before you right now a free exercise claim and my
10 other client has a free exercise claim that's live in
11 the lower courts. So those issues are preserved. But
12 I, think, as your question points out, this Court
13 really, first and foremost, can decide this on the basis
14 of the Federal statute, and the Ashwander principles of
15 constitutional avoidance seem like they would be sort of
16 fully applicable to the Court's consideration of that
17 question. And then, of course, the normal principles of
18 statutory construction would certainly point you to the
19 answer to the first objection the government raises,
20 which is do persons include for-profit corporations
21 because --

22 JUSTICE KAGAN: Mr. Clement, isn't this a
23 special kind of statute? Because this is a statute that
24 specifically refers back to a body of constitutional
25 law. It basically says we want to get right back to the

1 place that we were with respect to religious claims
2 before Employment Division v. Smith. And so we have --
3 it's not -- you know, it's a statute that directs us to
4 a body of constitutional law.

5 That body of constitutional law is, I think,
6 very different from the one you portray in your brief.
7 It suggests that accommodations should be made
8 sometimes, but rarely, and subject to a -- to a
9 balancing analysis, not to a compelling interest
10 standard in the way we would use it for, say, race
11 discrimination. So, you know, what's -- what's the
12 response to that?

13 MR. CLEMENT: Well, first, Justice Kagan,
14 let me take a little bit of an issue with your premise
15 and let me try to responsive to your question anyways
16 after I do that. How I'd like to take issue with your
17 premise is that when Congress first passed the statute
18 RFRA, it talked about free exercise as defined in the
19 Court's cases. And then at the time that it passed
20 RLUIPA, which is a later statute, it actually confronted
21 some lower court cases that had limited RFRA and tried
22 to impose a centrality requirement. And Congress didn't
23 want that. It didn't want to take all the baggage of
24 the pre-Smith free exercise cases. So it actually
25 amended the statute to broaden it so it now protects any

1 exercise of religion. So I would take issue with your
2 premise that RFRA simply picks up everything that ever
3 happened pre-Smith.

4 JUSTICE SCALIA: Well, there -- there's
5 another respect in which this, even as originally
6 enacted, does not track the -- the preemployment
7 Division v. Smith law. That is to say, the -- the
8 compelling State interest test in the prior cases was
9 never accompanied by a least restrictive alternative
10 requirement. That was an invention of this -- of this
11 law.

12 MR. CLEMENT: I think that's fair, Justice
13 Scalia. One of the things that you run into if you try
14 to sort of get at this statute the way that Justice
15 Kagan is suggesting is that not everybody exactly agreed
16 as to what the pre-Smith case law was. You described
17 the pre-Smith case law in your opinion in a certain way.
18 Justice O'Connor described the pre-Smith case law in
19 another way. So it's a little bit difficult to try to
20 say, as Justice Kagan's question would suggest, that
21 rather than just apply the statute as written, we should
22 really sort of just go back and apply pre-Smith laws if
23 this were --

24 JUSTICE KAGAN: Well, it is applying the
25 statute as written. The statute as written -- this is

1 not a question of legislative history -- the statute as
2 written points back to pre-Smith law. It says: That's
3 what we mean.

4 MR. CLEMENT: Well, you're right, Justice
5 Kagan, in the purpose part of the statute it says: What
6 we mean to do here is basically restore the pre-Smith
7 law. But it also accompanies that purpose statute with
8 operative language. And the operative language, which I
9 think this Court should apply, as Justice Scalia
10 suggests, applies broadly to any exercise of religion by
11 any person and then suggests that the relevant test is
12 substantial burden with the burden on my client as to
13 the substantial burden part of the test. And then
14 it's --

15 JUSTICE GINSBURG: Mr. Clement, this -- this
16 was a law that was passed overwhelmingly, both houses of
17 Congress. People from all sides of the political
18 spectrum voted for it. It seems strange that there
19 would have been that tremendous uniformity if it means
20 what you said it means, to take -- to cover profit
21 corporations, especially in light of -- there was an
22 effort to adopt a conscience amendment, a specific
23 conscience amendment in 2012, and the Senate rejected
24 that. That -- that amendment would have enabled secular
25 employers and insurance providers to deny coverage on

1 the basis of religious beliefs or moral convictions. It
2 was specifically geared to secular employers and
3 insurance providers. And that -- that was rejected.

4 MR. CLEMENT: Well, Justice Ginsburg, I
5 would suggest to the contrary. The reason that there
6 was such unanimity behind RFRA in the first place is
7 that efforts to limit it to just certain subclasses,
8 subsets of religious freedom claims, were rejected and
9 sort of everybody in Congress got together and said, all
10 right, you have some claims you actually want to be
11 vindicated, you have some claims you want to be
12 vindicated, we'll vindicate all of them. And if we're
13 going to look at any legislative history as shedding
14 light on this, then I would suggest you look at
15 Professor Laycock's brief, which goes into great detail
16 about the legislative debates involved in -- that led up
17 ultimately to the passage of RLUIPA. And when Congress
18 was trying to pass a broader statute, the RLPA, the
19 Religious Liberty Protection Act, the issue of the
20 statute's application and RFRA's application to
21 for-profit corporations was squarely put at issue by the
22 Nadler Amendment. And that amendment was rejected and
23 the House report that demonstrates the rejection of that
24 amendment could not be clearer that they understood that
25 for-profit corporations would be covered.

1 Now, in fairness, what they understood is
2 that we were probably talking about in the real world a
3 relatively small set of corporations like an
4 incorporated kosher market or kosher deli of the kind
5 that this Court had before it in the Crown Kosher case.
6 And so I think it's -- you know, we can talk about the
7 extent and how you'd apply these principles to Exxon,
8 but I think that's just something that's not going to
9 happen in the real world. It is no accident that the
10 claims that you have before you in these cases are
11 brought by small closely-held corporations that have
12 firmly held religious beliefs.

13 JUSTICE KAGAN: But, again, Mr. Clement as
14 Justice Ginsburg said, this was a very uncontroversial
15 law. Your understanding of this law, your
16 interpretation of it, would essentially subject the
17 entire U.S. Code to the highest test in constitutional
18 law, to a compelling interest standard. So another
19 employer comes in and that employer says, I have a
20 religious objection to sex discrimination laws; and then
21 another employer comes in, I have a religious objection
22 to minimum wage laws; and then another, family leave;
23 and then another, child labor laws. And all of that is
24 subject to the exact same test which you say is this
25 unbelievably high test, the compelling interest standard

1 with the least restrictive alternative.

2 MR. CLEMENT: Well, I don't say that. I
3 think Congress said that. But to be as responsive as I
4 can to your question, the parade of horrors that the
5 government offers you ought to sound familiar, because
6 if you look at that parade of horrors -- Social
7 Security, minimum wage, discrimination laws, compelled
8 vaccination -- every item on that list was included in
9 Justice Scalia's opinion for the Court in *Smith*. And
10 Justice O'Connor responded to that in her separate
11 opinion and she said, look, you've got to trust the
12 courts; just because free exercise claims are being
13 brought doesn't mean that the courts can't separate the
14 sheep from the goats. Now, whatever --

15 JUSTICE KAGAN: Well, she had an
16 understanding of how the Court worked pre-*Smith* that was
17 a kind of *Sherbert v. Verner-Yoder* understanding, which
18 was we did a balancing, we looked at the government's
19 interests, we took those very seriously, especially to
20 the extent that there was harm to identifiable third
21 parties and that it fell on an identifiable third party.
22 That was basically -- you could not get an accommodation
23 for that kind of harm.

24 MR. CLEMENT: Well, what she said and
25 whatever the merits of it as a matter of constitutional

1 debate isn't relevant. What -- what I think is relevant
2 is that Congress clearly preferred one side of that
3 debate and thought courts could handle this.

4 So then the question becomes: How do courts
5 actually apply this test? And I don't think applying
6 the test to recognize this case, where I think the
7 government has an incredibly weak case on compelling
8 interest and least restrictive alternatives, which they
9 almost don't want to talk about at all, is going to
10 endanger any other statutes. And if I could talk about
11 specific --

12 JUSTICE ALITO: Well, could I ask you this,
13 Mr. Clement. In -- in all the years since RFRA has been
14 on the books, has any of these claims involving minimum
15 wage, for example, been brought and have they succeeded?

16 MR. CLEMENT: Justice Alito, very few of
17 these claims have been brought. Very few of them have
18 succeeded, and that's notwithstanding the fact that all
19 of these statutes we're talking about apply to employers
20 generally. And it -- and none of those claims have been
21 brought or they haven't succeeded notwithstanding the
22 fact that the government concedes that sole
23 proprietorships and partnerships and nonprofit
24 corporations are all protected by RFRA.

25 Now, millions of Americans are employed by

1 proprietorships, partnerships, and nonprofits. So if
2 these statutes really were on a collision course, I
3 think we would have seen the collision already.

4 JUSTICE KAGAN: Well, with respect,
5 Mr. Clement, I think that that's probably because the
6 Court has had a different understanding of what RFRA
7 does and the kind of analysis that it requires courts to
8 perform than you're arguing for in this case. That if
9 your argument were adopted and there was a strict
10 scrutiny standard of the kind that usually applies and a
11 least restrictive alternative requirement, then you
12 would see religious objectors come out of the woodwork
13 with respect to all of these laws. And because you say
14 that there -- and I think this is absolutely right when
15 you say it -- that you -- you cannot test the centrality
16 of a belief to a religion, you cannot test the sincerity
17 of religion. I think a court would be, you know --
18 their hands would be bound when faced with all these
19 challenges if your standard applies.

20 MR. CLEMENT: Well, Justice Kagan, a couple
21 of thoughts. First of all, I mean, it's not like this
22 Court has never had a RFRA case that it applied the
23 standard on the merits. And in the O Centro case, this
24 Court applied something that very much felt to the
25 government at the time as being strict scrutiny. But if

1 this Court --

2 JUSTICE GINSBURG: Well, It was a religious
3 organization.

4 MR. CLEMENT: It certainly was a religious
5 organization and it's a separate question as --

6 JUSTICE GINSBURG: This is -- this is what's
7 different. I mean, all along the earlier cases dealt
8 with individuals and they dealt with religious
9 institutions.

10 MR. CLEMENT: Well, if I may, Justice
11 Ginsburg, there's two separate questions. There's a
12 question about how to apply the test if it's applicable
13 in a particular case, and I think O Centro is the
14 starting place for guidance on that.

15 Your question also brings up the separate
16 question about the coverage of the statute. And as to
17 that, I think the place to start is the statute itself,
18 which broadly provides coverages to persons. That is
19 not an incidental term. It's a term that picks up
20 additional context through the Dictionary Act and
21 specifically applies to all corporations, to joint
22 partnerships, to societies.

23 JUSTICE SOTOMAYOR: How does a corporation
24 exercise religion? I mean, I know how it speaks and we
25 have, according to our jurisprudence, 200 years of

1 corporations speaking in its own interests. But where
2 are the cases that show that a corporation exercises
3 religion?

4 MR. CLEMENT: Well, Justice Sotomayor,
5 those -- those cases -- I mean, I'd start with cases
6 like Lukumi or O Centro, which all involved
7 corporations, and nobody thought it was particularly
8 problematic there that the plaintiffs before the court
9 were artificial entities. And I suppose you could
10 take --

11 JUSTICE SOTOMAYOR: Well, but they were
12 really arguing about things that affected their
13 membership, not them as a corporate entity.

14 MR. CLEMENT: Well, I'm not sure that you
15 can so easily divide the two, and we can talk about how
16 it is with corporations generally. You understand how
17 the corporation has certain beliefs or certain intent, a
18 scienter requirement. The courts every day deal with
19 issues of trying to figure out what kind of intent or
20 motivation a corporate entity has.

21 JUSTICE SOTOMAYOR: So the dissent in this
22 case, in the Tenth Circuit case, said how do we
23 determine when a corporation has that belief? Who says
24 it? The majority of shareholders? The corporate
25 officers? The -- is it 51 percent? What happens to the

1 minority? And how much of the business has to be
2 dedicated to religion? 5 percent? 10 percent? 90
3 percent? Just assume not a business like yours -- you
4 picked great plaintiffs, but let's assume --

5 (Laughter.)

6 JUSTICE SOTOMAYOR: Let's assume just a
7 business that sells 5 percent of religious books,
8 doesn't play Christmas music, doesn't give off -- works
9 on Sunday, you know, does nothing else religiously.

10 MR. CLEMENT: Right. And, Justice
11 Sotomayor, I think the way to approach those cases would
12 be the same basic way you approach other questions of
13 corporate intent or corporate motivation. You look to
14 the governance doctrines, if any of this is put at
15 issue. And I think that's really a critical question,
16 which is ultimately, I think this line of questioning
17 goes to a question of sincerity, and if some large
18 corporation asserts some claim that's going to save them
19 lots of money, I would think that the government in
20 those kind of cases is really going to resist the
21 sincerity piece of the analysis. In this kind of
22 case --

23 JUSTICE SOTOMAYOR: That's the most
24 dangerous piece. That's the one we've resisted in all
25 our exercise jurisprudence, to measure the depth of

1 someone's religious beliefs.

2 MR. CLEMENT: To be clear, this Court's
3 cases have always distinguished between the sincerity
4 inquiry, which the Court has allowed, and the centrality
5 inquiry, which it suggested is inappropriate. But
6 sincerity has always been a part of this Court's cases.

7 JUSTICE SOTOMAYOR: I thought more
8 importantly was whether a burden was substantial or not.
9 That we've never acceded to the person claiming a
10 religious exemption, a belief in how substantial the
11 burden might be.

12 MR. CLEMENT: Right. This Court has not
13 questioned that. The Thomas case, I think, puts as
14 common ground the idea that you don't really
15 second-guess the person's -- the person's belief, but
16 you can contest sincerity. It is -- there is case law
17 in this. You know, you have people who are arrested in
18 possession of large quantities of marijuana and they
19 assert that they belong to the church of marijuana, and
20 those cases do get litigated and they get rejected. And
21 there's a lot of different ways to --

22 JUSTICE SOTOMAYOR: Is there -- is there a
23 different way of looking at it, the leeway? In U.S. v.
24 Lee, we said, "When followers of a particular sect enter
25 into a commercial activity as a matter of choice, the

1 limits they accept on their own conduct as a matter of
2 conscience and faith are not to be superimposed on the
3 statutory schemes which are binding on others in that
4 activity."

5 So isn't that really the answer, that we've
6 never considered a for-profit corporation as exercising
7 religion?

8 MR. CLEMENT: Well, let me -- let me take on
9 Lee first. And I mean, that's obviously the two lines
10 of Lee that are the government's favorite two lines in
11 Lee. But Lee starts with a substantial burden inquiry,
12 which is where most of these sincerity questions go.
13 And Lee definitely says that there is a sincere
14 religious belief and a substantial burden on religious
15 exercise.

16 So the two sentences that you're quoting
17 come in the compelling interest analysis of the case.
18 And I think Lee does stand for the proposition that in
19 the tax context, it's going to be very hard for somebody
20 to bring a claim that satisfies even the demanding
21 compelling interest, least restrictive alternative test.

22 JUSTICE SOTOMAYOR: Well, that's an
23 interesting question, because the briefs on both sides
24 here are written as if the penalty for not having a
25 health insurance policy that covers contraceptives is at

1 issue. But isn't there another choice nobody talks
2 about, which is paying the tax, which is a lot less than
3 a penalty and a lot less than -- than the cost of health
4 insurance at all? These employers could choose not to
5 give health insurance and pay not that high a penalty --
6 not that high a tax.

7 MR. CLEMENT: Well, just to put this in
8 concrete terms, for Hobby Lobby, for example, the choice
9 is between paying a 500 -- a \$475 million per year
10 penalty and paying a \$26 million per year coverage.

11 JUSTICE KAGAN: No, I don't think that
12 that's the same thing, Mr. Clement. There's one penalty
13 that is if the employer continues to provide health
14 insurance without this part of the coverage, but Hobby
15 Lobby could choose not to provide health insurance at
16 all. And in that case Hobby Lobby would pay \$2,000 per
17 employee, which is less than Hobby Lobby probably pays
18 to provide insurance to its employees.

19 So there is a choice here. It's not even a
20 penalty by -- in the language of the statute. It's a
21 payment or a tax. There's a choice. And so the
22 question is, why is there a substantial burden at all?

23 MR. CLEMENT: Well, just to be clear, we
24 were talking about the same thing. So the option, the
25 choice, is between paying a \$475 million a year penalty

1 and a \$26 million a year penalty. That's what Hobby
2 Lobby faces. So \$2,000 per person --

3 JUSTICE KAGAN: No, between paying \$2,000
4 per employee per year if Hobby Lobby does not provide --

5 MR. CLEMENT: That's \$26 million.

6 JUSTICE KAGAN: You know, Hobby Lobby is
7 paying something right now for the -- for the coverage.
8 It's less than what Hobby Lobby is paying for the
9 coverage. There are employers all over the United
10 States that are doing this voluntarily because they
11 think that it's less.

12 CHIEF JUSTICE ROBERTS: I thought -- I
13 thought that part of the religious commitment of the
14 owners was to provide health care for its employees.

15 MR. CLEMENT: That is true, Mr. Chief
16 Justice. It is also true that this --

17 JUSTICE SOTOMAYOR: Well, if they want to do
18 that, they can just pay a greater salary and let the
19 employees go in on the exchange.

20 MR. CLEMENT: Exactly, which is, by the way,
21 why comparing the \$2,000 penalty to the cost of the
22 health care is a false -- it's a false comparison.

23 JUSTICE SOTOMAYOR: It's not called a
24 penalty. It's called a tax. And it's calibrated -- and
25 it's calibrated --

1 CHIEF JUSTICE ROBERTS: She's right about
2 that.

3 (Laughter.)

4 MR. CLEMENT: And it has been treated for
5 some purposes as a penalty. And I think for this
6 purposes, it certainly feels punitive.

7 And if I could finish the thought about why it's
8 a false comparison, the 2,000 penalty to the cost of the
9 health insurance, is that it's going to very much hurt
10 Hobby Lobby if all of the sudden it doesn't provide
11 health care to its employees. And in order to
12 compensate for that, it would have to increase the
13 wages. And I think it would be worse off as a result of
14 this. But if I could also --

15 JUSTICE KAGAN: Well, let's say that that's
16 right. Let's say that they have to increase the wages a
17 little bit. I mean, still we are talking about pretty
18 equivalent numbers. Maybe it's a little bit less; maybe
19 it's a little bit more. But this is not the kind of
20 thing that's going to drive a person out of business.
21 It's not prohibitive.

22 It's like the thing that we talked about in
23 Braunfeld where we said, you know, maybe if the store
24 can't stay open 7 days a week, it makes a little bit
25 less money. But so be it, is what we said.

1 MR. CLEMENT: No, I actually think what it's
2 like, Your Honor, with all due respect, it's like the
3 five dollar penalty enforcing the prohibition in Yoder.
4 And what this Court says, it's one thing if you don't
5 have a direct government prohibition on a religious
6 exercise or a mandate that somebody do something that
7 violates their religion. In those cases, which is like
8 Sherbert and is like Braunfeld, then you have to look at
9 the substantial pressure, and it becomes a little bit
10 more of a loosey-goosey analysis. But when you have a
11 government law that specifically says you must do
12 something that violates your religion -- and it's
13 enforced with a penalty, and with all due respect I
14 think \$2,000 per employee is a penalty.

15 JUSTICE KAGAN: But Mr. Clement, it's not
16 saying you must do something that violates your
17 religion. It's giving you a choice. You can do this
18 thing or if this thing violates your religion you can do
19 another thing. And that other thing is approximately
20 the same price as the thing that you don't want to do.

21 MR. CLEMENT: I don't think it would be the
22 same price at the end of the day. I'd also like to
23 point out how this --

24 JUSTICE SCALIA: Well, of course it wouldn't
25 be the same price at the end of the day. If they deny

1 health insurance, they're going to have to raise wages
2 if they are going to get employees.

3 MR. CLEMENT: Absolutely.

4 JUSTICE SCALIA: It's absurd to say that,
5 you know, it comes out of nowhere.

6 MR. CLEMENT: Absolutely, Your Honor. And
7 by the way, this \$2,000 penalty is very much a
8 double-edged sword for the government, because you're
9 trying to --

10 JUSTICE KENNEDY: But why -- why is that a
11 problem? Let's assume that the cost of providing
12 insurance is roughly equivalent to the \$2,000 penalty.
13 How -- how is the employer hurt? He can just raise the
14 wages.

15 JUSTICE SOTOMAYOR: May I just put a
16 footnote on this. I thought the average price of
17 providing insurance for a single person is \$4,000, and
18 it's \$12,000 for a family -- for a family. So the 2,000
19 tax -- that's what it's called -- is to help the
20 government provide subsidies to people on the exchange
21 that don't have employer insurance. So it's a tax
22 because it's -- it is to do exactly what your client
23 wants, to get the government to supply the
24 contraceptives, not the insurance companies.

25 MR. CLEMENT: Here's the problem with this

1 way of looking at it, which is to say whatever it costs
2 per employee to get this, this health care, that's
3 something that right now Hobby Lobby is paying whatever
4 it's paying them, plus it's -- it's -- you know, imputed
5 into that is the idea that they're getting their wage
6 and they're getting health care insurance.

7 If they take away the health care insurance,
8 they are going to have to increase the wages to make up
9 for that. And they're going to have to pay the \$2,000
10 penalty on top of it, plus they're going to have to
11 violate their -- their own interest which is, we
12 actually -- we believe it's important to provide our
13 employees with qualified health care.

14 JUSTICE KENNEDY: Okay, the last is
15 important. But just assume hypothetically that it's a
16 wash, that the employer would be in about the same
17 position if he paid the penalty and the employer --
18 pardon me, an employee went out and got the insurance
19 and that the employee's wages were raised slightly and
20 then it's -- and that it's a wash so far as the employer
21 are concerned, other than the employer's religious
22 objection, but just on the financial standpoint. Can we
23 assume that as a hypothetical. Then what would your
24 case be?

25 MR. CLEMENT: I think my case would be that

1 in that case the government might be able to sort of
2 support itself on the compelling interest. I think
3 there would still be a substantial burden on their
4 exercise. But again, this all turns on issues that the
5 government hasn't put in issue. This case hasn't been
6 litigated on this particular theory, so I think -- I'd
7 love to have the opportunity to show how by not
8 providing health insurance it would have a huge burden
9 on my client and their ability to attract workers, and
10 that in fact would cost them much more out of pocket.
11 But that's not been the nature of the government's
12 theory.

13 JUSTICE KAGAN: Can I ask --

14 JUSTICE GINSBURG: There was a point made
15 earlier, and I think you didn't mean to say this, that
16 provision of health care is not part of their religious
17 belief. Covering their employees for health care, that
18 is not a religious tenet, right?

19 MR. CLEMENT: No, it actually is. Again, it
20 hasn't been the principal theory on which this case has
21 been litigated. But see, if you go back to the
22 complaints and you go back to our briefs, you know, it's
23 part of the religious beliefs that both the Hahns and
24 the Greens have. They think it's actually important --

25 JUSTICE KAGAN: But, Mr. Clement, you're not

1 saying, are you, that their religious beliefs mandate
2 them to provide health care? I thought that you were
3 never making that claim.

4 MR. CLEMENT: I didn't have to make that
5 claim in the course of this litigation. What I'm
6 pointing out, though, is for purposes of the substantial
7 burden analysis, it is perfectly appropriate to take
8 into account that the 2,000 -- the \$26 million in fines
9 they would pay would not be the only thing that they
10 would lose out if they are on that horn of the dilemma.
11 They would also lose out all the additional wages they
12 would have to pay, and they would be in this position of
13 not offering health care, which is something they
14 believe is important for their religion as well.

15 JUSTICE KAGAN: You know, I'm sure they seem
16 like very good employers. And I'm sure they want to be
17 good employers. But again, that's a different thing
18 than saying that their religious beliefs mandate them to
19 provide health insurance, because here Congress has said
20 that the health insurance that they're providing is not
21 adequate, it's not the full package.

22 MR. CLEMENT: Well, with respect, what
23 Congress has said is that this kind of plan is not
24 appropriate for a non-grandfathered plan. But if we're
25 going to talk about the government's compelling

1 interests here, which I think has got to be part of the
2 analysis, then I think the grandfathered provisions of
3 this statute really are devastating for the government's
4 argument that it has a compelling interest.

5 When the government pursues compelling
6 interest, it demands immediate compliance. It doesn't
7 say, "Get around to it whenever it's convenient." I
8 can't imagine Congress passing Title VII and saying,
9 "Stop discriminating on the basis of race, unless of
10 course you have a preexisting policy that discriminates
11 on the basis of race, and then you can keep it as long
12 as you'd like."

13 It is fundamentally inconsistent with a
14 compelling interest --

15 JUSTICE KAGAN: Well, but I think even --

16 MR. CLEMENT: -- analysis to have this kind
17 of grandfathering.

18 JUSTICE KAGAN: -- that example, you know,
19 initially Title VII did not apply to any employers with
20 fewer than 25 employees. And then gradually, Congress
21 brought the number down because Congress realized that
22 there were going to be transition issues and that some
23 time was needed to make sure that the compelling
24 interest, you know, should be applied uniformly across
25 all employers.

1 MR. CLEMENT: Here's, respectfully, why I
2 don't think that that works, which is I think the
3 question whenever there are exemptions in the statute is
4 to ask yourself, do the exemptions undermine the
5 compelling interest that the government asserts.

6 There's nothing inconsistent with an
7 interest in prohibiting employment discrimination to say
8 we're going to focus on the people who actually employ
9 the most people and therefore can engage in the most
10 discrimination.

11 It's quite a different matter, and I don't
12 think anybody would think that Congress would pass a
13 Title VII that said, "Hey, as long as you have a
14 preexisting discriminatory policy, you're allowed to
15 keep it." That doesn't seem like it would be
16 consistent.

17 JUSTICE SOTOMAYOR: Counsel, your
18 attorney -- one of the attorneys below on behalf of your
19 clients admitted that the grandfathered policies weren't
20 going to be around very long because any change to an
21 existing policy -- and he said these changes happen on a
22 yearly basis. And we already know from the government's
23 statistics that it's up to 40 percent now have
24 grandfathered out. Your own client changed its policy,
25 and that's why it's not grandfathered.

1 And he changed it to drop contraceptives it
2 was covering.

3 MR. CLEMENT: Well --

4 JUSTICE SOTOMAYOR: And so my point is,
5 since when does a transitioned grandfathered exemption
6 and one that everybody knows will have to change,
7 because premiums by definition will change or co-pays
8 will change, something is going to change -- it's a very
9 short transition period. Since when does that prove
10 that the need is not compelling?

11 MR. CLEMENT: With all due respect, it's not
12 necessarily a very short transition period. And your --
13 your references to co-pays and premiums is precisely on
14 point, because the government, through its regulations,
15 has allowed grandfathered plans to make changes to the
16 co-pays as long as they're indexed to medical inflation.

17 Now, if you have a transition period that's
18 just there for a nanosecond, you don't bother indexing
19 it to medical inflation. So this is a grandfather
20 provision that's going to be around for multiple years.
21 And by the government's own numbers, tens of millions of
22 employees are not getting this mandated coverage as a
23 result of the grandfather provision. And even if we can
24 project forward ten years to when maybe there would only
25 be a handful of grandfathered plans, even at that point,

1 you would still have the same problem that the
2 government would have, which is it has to make an
3 argument for a compelling interest.

4 JUSTICE KENNEDY: Just before your time
5 starts to go too fast, how would you suggest that we
6 think about the position and the rights of the -- of the
7 employees? And you can have hypotheticals about the
8 employer makes them -- wants to make them wear burkas
9 and so forth. That's not in this case.

10 But in -- in a way, the employees are in a
11 position where the government, through its healthcare
12 plans, is -- is, under your view, is -- is allowing the
13 employer to put the employee in a disadvantageous
14 position. The employee may not agree with these
15 religious -- religious beliefs of the employer. Does
16 the religious beliefs just trump? Is that the way it
17 works?

18 MR. CLEMENT: Well, no, it's not just the
19 way it works, Justice Kennedy. And I actually have four
20 things I'd like to say about that, if it's possible.

21 One is, I think the first thing about
22 third-party burdens is you have to ask where are they
23 coming from. And if the third-party burdens are coming
24 from an employer -- I mean, an employer right now can
25 put some burden on their rights because they have to

1 listen to religious music or whatever. That's not as
2 serious as a burden that's coming directly from the
3 government. So that's one principle to think about.

4 Another principle, and this is more of a
5 detail, but I think it's important, is that to the
6 extent you take into account third-party burdens, you
7 take those into account in the compelling interest part
8 of the analysis. The government has an argument that
9 somehow third-party interests go into the substantial
10 burden part of the analysis, where we bear the burden.
11 And we don't think that's right at all.

12 The third-party --

13 JUSTICE GINSBURG: But, Mr. Clement, you
14 made the analogy to RLUIPA. And the one thing that has
15 not been mentioned up till now is the Establishment
16 Clause. The Court was very clear when it came to
17 RLUIPA, which you said is similar to RFRA, that the
18 accommodation must be measured so it doesn't override
19 other significant interests. And that was true of
20 Sherbert and that was true of Yoder. The -- and the
21 Cutter case, and this Court made it very clear, that the
22 accommodation has to be balanced and you have to take
23 into account other significant interests.

24 MR. CLEMENT: Right. But that actually
25 brings me to my third point, which is those other

1 significant interests that carry the most weight have to
2 be independent of the very statute that's at issue in
3 the case and that the party seeks an exemption from.

4 So if you think about the Caldor case, there
5 the Court was concerned with the third-party burdens on,
6 say, an employee who had a seniority right to take the
7 weekends off. So he or she had an independent right to
8 take the weekend off, and the government policy was
9 coming in and displacing this.

10 JUSTICE SOTOMAYOR: I'm not sure that --
11 that squares with Lee. The -- the statute created the
12 right to Social Security, and there the Court said you
13 can't deprive employees of a statutory right because of
14 your religious beliefs. So Lee is contrary to the point
15 you're making.

16 MR. CLEMENT: There, too, I have to
17 respectfully disagree, because if you remember the facts
18 of Lee, Lee is brought not just by the employer, but by
19 the employee. So the particular employees there don't
20 have a beef with what he's doing at all. And I think
21 when they're talking about third-party burdens there,
22 what the Court is really talking about is the -- the
23 burdens of everybody else who contributes into a system
24 where uniformity, to use the Court's words, was
25 indispensable.

1 And so if I could, though, I think, just to
2 illustrate why it's sort of double counting to count the
3 mandated issue here as being what gives the burden to
4 the third party or the benefit on the third party.
5 Imagine two hypotheticals. One is Congress passes a
6 statute and says I have to destroy all of my books,
7 including my Bibles. Another statute, Congress comes in
8 and says I have to give all of my books, including all
9 of my Bibles, to you.

10 Now, in the second case, I suppose you could
11 say that a RFRA claim somehow gets rid of your statutory
12 entitlement to my Bibles, but I don't think, since it's
13 the very benefit that we're talking about that's at
14 issue there, I don't think -- I think that really is
15 double counting and I don't think those two hypothetical
16 statutes should be analyzed any differently.

17 The other thing, though, about burdens, and
18 I think it should go -- this is the fourth point -- that
19 should go into the compelling interest test --

20 JUSTICE KAGAN: I mean, Mr. Clement, isn't
21 that just a way of saying that you think that this isn't
22 a good statute, because it asks one person to subsidize
23 another person. But Congress has made a judgment and
24 Congress has given a statutory entitlement and that
25 entitlement is to women and includes contraceptive

1 coverage. And when the employer says, no, I don't want
2 to give that, that woman is quite directly, quite
3 tangibly harmed.

4 MR. CLEMENT: Well, Justice Kagan, I think
5 you could say the same thing about my Bible
6 hypothetical.

7 But I do have one last thing to say about
8 burdens. And I do think when you think about impacts on
9 third parties, not all of these burdens are created
10 equal. And that, too, I think is borne out in this
11 Court's cases. And the most relevant factor is, is
12 there some alternative way for the government to
13 ameliorate the burden.

14 And I think about two types of, kind of
15 accommodations, if you will. You get sort of Title VII
16 with a very narrow accommodation. And then you have
17 conscience clauses that allow medical providers,
18 including for-profit medical providers, not to provide
19 abortions.

20 Now, each of those has a burden on third
21 parties, but I would respectfully suggest they're
22 different. In the case of the employee who's been
23 subject to racial discrimination, even if they can get
24 another job, that racial discrimination is a unique
25 injury to them that you can't remedy unless you tell the

1 employer, don't discriminate on the basis of race.

2 Now, in the context of the conscience
3 clause, if a woman can't get an abortion from her
4 preferred provider, that's surely a significant burden
5 on her. But we don't view that as trumping the
6 conscience clause, because she can get the abortion
7 through another mechanism.

8 Here, as your question rightfully
9 highlights, all we're really talking about is who's
10 going to pay for a subsidy that the government prefers.
11 This is not about access to the contraception. It's
12 about who's going to pay for the government's preferred
13 subsidy. And I think in that context, there are ample
14 alternative ways to address any burdens on third
15 parties. And that goes right to the least --

16 JUSTICE GINSBURG: It would make no
17 difference if it were -- there are 20 FDA-approved
18 contraceptives, all of them covered by the Healthcare
19 Act.

20 MR. CLEMENT: I think --

21 JUSTICE GINSBURG: You -- you picked out, in
22 one case what, three, and the other case four? Suppose
23 the employer says contraceptives all together are
24 against my religion, so I'm not going to give any
25 contraceptive coverage.

1 MR. CLEMENT: Well, obviously,
2 Justice Ginsburg, I didn't pick these out. I mean, my
3 clients and their religious beliefs identified these as
4 problematic. There are certainly --

5 JUSTICE GINSBURG: But your argument, it
6 seems to me, would apply just as well if the employer
7 said no contraceptives.

8 MR. CLEMENT: I think that's a fair point,
9 Justice Ginsburg, and the government's own
10 accommodations, where they offer them to religious
11 groups and religious employers like nonprofit hospitals,
12 also applies to whatever the religious beliefs of that
13 provider are. So if they extend to all 20, then the
14 exemption's applied to all 20. If they only extend to
15 four, then the exemption applies to all four.

16 JUSTICE ALITO: Are there ways of
17 accommodating the interests of the women who may want
18 these particular drugs or devices without imposing a
19 substantial burden on the employer who has the religious
20 objection to it?

21 MR. CLEMENT: There are ample less
22 restrictive alternatives, Your Honor.

23 JUSTICE ALITO: What are they?

24 MR. CLEMENT: And I think they all flow from
25 this fact that this is ultimately about who's going to

1 pay for a substitute --

2 JUSTICE SOTOMAYOR: Those are alternatives
3 that you're asking the government to incur or the person
4 to incur. There isn't an alternative that doesn't put a
5 cost on someone else.

6 MR. CLEMENT: Well, it's -- it's -- it's
7 funny about this particular mandate because the
8 government's position is this is actually a cost-free
9 mandate; that whatever you pay out in contraceptions,
10 you're going to make up in not having to pay for other
11 coverages. And so one alternative, one less restrictive
12 alternative is what's done in the accommodation for
13 nonprofit employers like hospitals, where basically they
14 tell the insurance carrier or the plan administrator that
15 you pick up the cost for this and then essentially it'll
16 be cost neutral from you.

17 But I don't think there's anything sort of
18 sacrosanct, if you will, about having the government pay
19 for its preferred subsidy as a less restrictive
20 alternative. And that's essentially what the government
21 does for those employees who have employers -- under 50
22 employers. If those employees -- if the employer
23 doesn't provide healthcare, those employees go on to the
24 exchanges with a subsidy from the government. Now, they
25 can do the same thing for objecting religious employers.

1 They just have chosen not to.

2 If I may reserve my time.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Clement.

5 General Verrilli.

6 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

7 ON BEHALF OF THE FEDERAL GOVERNMENT

8 GENERAL VERRILLI: Mr. Chief Justice, and
9 may it please the Court:

10 The touchstone for resolving this case is
11 the principle Justice Jackson articulated in Prince v.
12 Massachusetts. As he said, "Limitations which of
13 necessity bound religious freedom begin to operate
14 whenever activities begin to affect or collide with the
15 liberties of others or of the public. Adherence to that
16 principle is what makes possible the harmonious
17 functioning of a society like ours, in which people of
18 every faith live and work side by side."

19 CHIEF JUSTICE ROBERTS: That's a statement
20 that is inconsistent with RFRA, isn't it? The whole
21 point of RFRA is that Congress wanted to provide
22 exceptions for the religious views of particular --
23 including proprietors, individuals.

24 GENERAL VERRILLI: No, Mr. Chief Justice, I
25 don't think so at all. In fact, the -- although I

1 was -- of course, I was referring to Justice Jackson's
2 words for their wisdom because it wasn't the opinion of
3 the Court. But see, Jackson --

4 CHIEF JUSTICE ROBERTS: Yeah. But the
5 wisdom you cited is the idea that you don't have
6 imposed, on the basis of religious beliefs, exemptions
7 or -- or limitations. And it seems to me that was the
8 whole point of RFRA, to tell the courts that that is
9 exactly what you should do unless the exception
10 satisfies the strict scrutiny test.

11 GENERAL VERRILLI: Well, but I think --
12 well, unless it satisfies the -- the pre-Smith standards
13 under -- under the Establishment Clause. But I do think
14 that the exact same point --

15 JUSTICE SCALIA: It's more than pre-Smith.

16 GENERAL VERRILLI: I take your point --

17 JUSTICE SCALIA: Plus --

18 GENERAL VERRILLI: -- I take your point
19 about less restrictive means, Your Honor.

20 JUSTICE SCALIA: Okay.

21 GENERAL VERRILLI: But the -- the exact same
22 point that Justice Jackson made in Prince, I submit, is
23 the point that this Court made unanimously in Cutter.
24 It's not -- it's that when you are analyzing what is
25 required under RFRA, the court must take account of the

1 way in which the requested accommodation will affect the
2 rights and interests of third parties.

3 JUSTICE ALITO: Well, is it your argument
4 that providing the accommodation that's requested here
5 would violate the Establishment Clause?

6 GENERAL VERRILLI: It's not our argument
7 that it would violate the Establishment Clause. But it
8 is our argument that you -- in any RFRA case, including
9 this one, you have to consider the impact on third
10 parties, because otherwise, you will be skating on thin
11 constitutional ice.

12 And so Justice Kennedy, you asked about
13 principles that -- that surround statutory construction.
14 Avoidance is one of them. And that was why the Court
15 unanimously in Cutter said that in every RFRA case when
16 you're considering an accommodation, you have to weigh
17 the effect on third parties. And that --

18 JUSTICE SCALIA: Where -- where is that in
19 RFRA? I mean, what -- what factor of RFRA do you fold
20 that in under? Is -- is that part of the compelling
21 State interest requirement or -- or substantial burden
22 requirement? Where -- where is it in RFRA?

23 GENERAL VERRILLI: I'd like -- I think the
24 answer is that it could inform every operative provision
25 in RFRA. We have said that it should inform the court's

1 interpretation of who counts as a person.

2 JUSTICE SCALIA: If -- if they wanted you to
3 balance -- balance the interest of the religious
4 objector against the interest of other individuals,
5 they -- they made no reference to that in RFRA at all.

6 GENERAL VERRILLI: Well, I --

7 JUSTICE SCALIA: They said unless the
8 government has a compelling State interest.

9 GENERAL VERRILLI: And the compelling -- and
10 certainly compelling interest analysis certainly does
11 require consideration of the interests of third parties.
12 Of course, what the court -- what the Congress said in
13 RFRA, in explaining how the compelling interest test was
14 to work, was that it was to strike a sensible balance
15 between claims for religious liberty and governmental
16 interests.

17 And -- and, of course, Lee is one of the
18 pre-Smith cases that provides the governing law. And I
19 would submit it is really the only case from this Court
20 in which the request for an exemption under the Free
21 Exercise Clause had the effect of extinguishing a
22 statutorily-guaranteed benefit. Because in Lee, had the
23 employer gotten the exemption from providing Social
24 Security, the consequence would have been that the
25 employees would have been disqualified from receiving

1 Social Security benefits.

2 JUSTICE SCALIA: But that wasn't the basis
3 for -- for denying the claim. The basis was that the
4 government has to run a uniform system that applies to
5 everybody.

6 GENERAL VERRILLI: I disagree.

7 JUSTICE SCALIA: And you can't argue that
8 here because the government has made a lot of
9 exemptions.

10 GENERAL VERRILLI: I -- first of all, I
11 disagree with respect to Lee, that one of the points
12 that the Court made in Lee was that granting the
13 exemption from Social Security taxes to an employer
14 operates to impose the employer's religious faith on the
15 employees. It was one of the grounds of decision.

16 Now -- but turning to -- I would like to
17 address these exemptions. I'm happy to talk about them.
18 I'm happy to talk about our compelling interest at
19 length. The -- now, the -- my --

20 JUSTICE ALITO: Well, if you could start
21 with the question of whether the -- the companies in
22 this case have a right to bring RFRA claims because
23 they're for-profit corporations. You argue that they
24 can't.

25 GENERAL VERRILLI: That's correct.

1 JUSTICE ALITO: Now, why is that? Is it --
2 is it your position that there's something about the
3 corporate form per se that is inconsistent with the free
4 exercise claim?

5 GENERAL VERRILLI: No, because, obviously,
6 churches can bring claims.

7 JUSTICE ALITO: All right. But is it your
8 argument that there's something about engaging in a
9 for-profit activity that is inconsistent with a free
10 exercise claim?

11 GENERAL VERRILLI: Yes. And if I could walk
12 through the -- let me, if you don't mind, just walk
13 through the analysis on --

14 JUSTICE ALITO: Well, were the merchants in
15 the Braunfeld case engaged in for-profit activity?

16 GENERAL VERRILLI: Yes.

17 JUSTICE ALITO: So there isn't anything
18 inherent in --

19 GENERAL VERRILLI: But I think --

20 JUSTICE ALITO: -- in participating in a
21 for-profit activity that's inconsistent with corporate
22 form, is there? I'm sorry, with a free exercise claim.

23 GENERAL VERRILLI: Yes. But I think the
24 relevant question is what did Congress think it was
25 doing when it enacted RFRA in 1993? What kinds of

1 claims did it think it was --

2 JUSTICE ALITO: Well, what is it about --

3 GENERAL VERRILLI: -- justifying?

4 JUSTICE ALITO: -- a for-profit corporation
5 that is inconsistent with a free exercise claim? Do you
6 agree with the proposition that was endorsed by one of
7 the lower courts in this case, that for-profit
8 corporations must do nothing but maximize profits, they
9 cannot have other aims --

10 GENERAL VERRILLI: No, not --

11 JUSTICE ALITO: -- including religious aims?

12 GENERAL VERRILLI: No. But here's how we
13 look at it. At its core --

14 JUSTICE SOTOMAYOR: I'm sorry, General. You
15 answered yes to Braunfeld. It was Jewish merchants, but
16 it was the merchants themselves --

17 GENERAL VERRILLI: Individuals.

18 JUSTICE SOTOMAYOR: -- the individuals --

19 GENERAL VERRILLI: Yes.

20 JUSTICE SOTOMAYOR: -- not the corporation
21 that was going to be jailed. It was a --

22 GENERAL VERRILLI: Yes, that's right.

23 JUSTICE SOTOMAYOR: -- criminal prosecution.

24 GENERAL VERRILLI: I understood Justice
25 Alito to be asking me not about the corporate form, but

1 about the -- the activity. And when you have an
2 individual, you have an individual. It's a person.

3 JUSTICE SOTOMAYOR: So whether it was a
4 merchant that was a corporation or not was irrelevant.
5 It was that the individual was --

6 GENERAL VERRILLI: That's --

7 JUSTICE SOTOMAYOR: -- going to be jailed.

8 GENERAL VERRILLI: That's correct.

9 JUSTICE SCALIA: It was an individual making
10 a profit, right?

11 GENERAL VERRILLI: Certainly.

12 JUSTICE SCALIA: He was running a business
13 for a profit, and that was the point of -- of Justice
14 Alito's question, right, which I think you understood.

15 GENERAL VERRILLI: And I did try to answer
16 it, yes. But I -- but let me say, I think the relevant
17 question here is what did Congress think it was doing in
18 1993? And I think the answer to that has to be in --
19 you know, we understand the Dictionary Act provides a
20 broad definition of person, but the Dictionary Act
21 doesn't define exercise religion. And the operative
22 statutory language is exercise -- person's exercise of
23 religion. And so you can't look to the Dictionary Act
24 to define that. But Congress told you where to look.
25 It told you to look to the pre-Smith case law --

1 JUSTICE ALITO: And why did it tell --

2 GENERAL VERRILLI: -- to define that.

3 JUSTICE ALITO: Why did it say that? It
4 changed the definition at the time when RLUIPA was
5 adopted, did it not, to eliminate the reference to the
6 First Amendment; isn't that right?

7 GENERAL VERRILLI: Yes. But it -- but the
8 difference there was to say it didn't want courts to get
9 involved in the entangling enterprise of deciding what
10 was a central belief versus what was --

11 JUSTICE ALITO: Well, it says free exercise.
12 And didn't it also adopt a provision in RLUIPA saying
13 that -- that the exercise of religion was to be
14 interpreted in the broadest possible way?

15 GENERAL VERRILLI: Well, I think it -- it
16 said something more precise than that, which was that it
17 was to be interpreted not to be confined only to central
18 religious tenets.

19 JUSTICE ALITO: No. Didn't it say -- didn't
20 it say the term "religious exercise" includes any
21 exercise --

22 GENERAL VERRILLI: Yes, includes any
23 exercise of religion, but it doesn't define what that
24 is. It just says you don't draw a line between
25 centrality and something that may --

1 JUSTICE ALITO: No. But there is another
2 provision that says that, "This chapter shall be
3 construed in favor of a broad protection of religious
4 exercise to the maximum extent permitted by the terms of
5 this chapter and the Constitution."

6 GENERAL VERRILLI: Right. And it -- but
7 with respect to what exercise religion means, it said
8 don't draw lines between centrality and non-centrality.
9 It didn't go beyond that and tell you what it means.
10 And what RFRA tells you to look to is pre-Smith case
11 law. And in the entire history of this country, there
12 is not a single case in which a for-profit corporation
13 was granted an exemption on --

14 JUSTICE SCALIA: Not a single case in which
15 it was denied exemption, either. All you're saying
16 is --

17 GENERAL VERRILLI: Well, Lee --

18 JUSTICE SCALIA: -- that there are no cases.

19 GENERAL VERRILLI: Well, Lee was certainly a
20 case in which a for-profit enterprise was denied an
21 exemption. Braunfeld was such a case. Gallagher was
22 such a case.

23 JUSTICE SCALIA: Not on the ground that it
24 was a for-profit enterprise. There is not a single case
25 which says that a for-profit enterprise cannot make a --

1 a freedom of religion claim, is there?

2 GENERAL VERRILLI: Right. There is not a
3 single case --

4 JUSTICE SCALIA: Right.

5 GENERAL VERRILLI: -- holding that. Except
6 that in Lee, it was critical to the Court's analysis
7 that the -- that the -- that Mr. Lee and his business
8 had chosen to enter the commercial sphere.

9 JUSTICE KAGAN: Isn't that a merits
10 question, General? I mean, I totally understand that
11 argument as a -- as an argument about the merits. I'm
12 not sure I understand it as a threshold claim that
13 this -- that the claim is not recognizable at all.

14 GENERAL VERRILLI: Right. Well, let me -- I
15 do want to move to the compelling interest analysis, but
16 if I could make one point in response to Your Honor's
17 question, that the Court's got to decide what person --
18 a person's exercise of religion means. And that -- it
19 seems to me that it would be such a vast expansion of
20 what Congress must -- could have thought it was doing in
21 1993, when it enacted RFRA, to say that for-profit
22 corporations can make claims for religious exemptions to
23 any laws of general application that they want to
24 challenge.

25 I do -- you know, Mr. Clement says, well,

1 you don't have to worry about anything other than small,
2 tightly-knit corporations like the one at issue here. I
3 take the point of the appeal of a situation like this
4 one. But the way in which he suggests that you will be
5 able to distinguish this case from a case in which a
6 large corporation comes in or a public company comes in,
7 is that you will have more grounds to question the
8 sincerity of the claim. But that raises exactly the
9 kinds of entanglement concerns that this Court has
10 always said you should try to avoid.

11 CHIEF JUSTICE ROBERTS: Well, that's his
12 argument for distinguishing it. But there are others,
13 including the fact that it is more you avoid all of the
14 problems with what to do if it's a -- you know, there's
15 a 51 percent ownership of the shareholders, if you
16 simply say that it's in this type of Chapter S
17 Corporation that is closely held. Whether it applies in
18 the other situations is -- is a question that we'll have
19 to await another case when a large publicly-traded
20 corporation comes in and says, we have religious
21 principles, the sort of situation, I don't think, is
22 going to happen.

23 GENERAL VERRILLI: But even with respect to
24 these companies, Your Honor, what are you going to do if
25 there's a dispute between -- let's say there are three

1 shareholders -- a dispute between two in the majority
2 and one in the minority? You're going to have to get
3 yourself involved -- the courts will have to get
4 themselves involved in all kinds of --

5 JUSTICE SCALIA: Whoever controls the
6 corporation. Whoever controls the corporation
7 determines what the party --

8 GENERAL VERRILLI: And then -- and the
9 minority shareholder will say, well, this is -- under
10 state law, this is an act of oppression and this
11 is --

12 CHIEF JUSTICE ROBERTS: Well, that's a
13 question of State corporate law. It's not a question of
14 who can bring an action under RFRA.

15 Could I just raise -- eight courts of
16 appeals, every court of appeal to have looked at the
17 situation have held that corporations can bring racial
18 discrimination claims as corporations.

19 Now, does the government have a position on
20 whether corporations have a race?

21 GENERAL VERRILLI: Yes. We think those are
22 correct and that this situation is different.

23 CHIEF JUSTICE ROBERTS: So that -- so that a
24 corporation does have a race for purposes of
25 discrimination laws.

1 GENERAL VERRILLI: No, not that the
2 corporation has a race, but that corporations can bring
3 those claims. But you're not interpreting -- in that
4 situation, all you're interpreting is the word "person"
5 in a statute, not exercise of religion, which is what
6 makes it different here.

7 CHIEF JUSTICE ROBERTS: So those -- those
8 cases involve construction of the term "person"?

9 GENERAL VERRILLI: Yes, but only "person."

10 CHIEF JUSTICE ROBERTS: So the person -- the
11 corporation can bring as a person a claim of racial
12 discrimination.

13 GENERAL VERRILLI: That's correct, but not
14 exercise of religion. That's the difference. But let
15 me, if I could, we think that part of the problem here
16 and the reason we make the argument we do at the
17 threshold about why you ought not recognize claims under
18 RFRA for for-profit corporations is that they are going
19 to predictively give rise to the kinds of issues you
20 have in this case in which the exemption is going to
21 impose a burden on third parties or extinguish rights of
22 third parties, employees or others, and that that --
23 that really can't be what Congress was thinking about.
24 But even if you --

25 JUSTICE ALITO: If you say they can't even

1 get their -- they can't even get their -- their day in
2 court, you're saying something pretty, pretty strong.

3 GENERAL VERRILLI: And I understand, but if
4 Your Honor disagrees with me -- if the Court doesn't
5 agree with this position at the threshold, the same
6 considerations with respect to the harms of third
7 parties definitely play into the compelling-interest
8 analysis.

9 In fact, under RFRA, the standard, the
10 precise standard of the statute says the government must
11 meet is that it must show that the application of the
12 law to the particular parties here, Conestoga and Hobby
13 Lobby, is in furtherance of the government's compelling
14 interest. That's the test. So the question here is
15 whether having Hobby Lobby and Conestoga provide this
16 coverage is in furtherance of the government's interests
17 in ensuring that this kind of preventive service
18 coverage is available and, in particular, the
19 contraceptive coverage that's included within it.

20 JUSTICE KENNEDY: Is it your position that
21 part of the compelling interest here is that you have to
22 protect the integrity -- the operational integrity of
23 the whole Act?

24 GENERAL VERRILLI: It is part of our
25 argument, absolutely. And -- but it -- but there is in

1 addition to that, much more --

2 JUSTICE KENNEDY: Does that mean the
3 constitutionality of the whole Act has to be examined
4 before we accept your view?

5 GENERAL VERRILLI: Well, I think it has been
6 examined, Your Honor, is my recollection.

7 (Laughter.)

8 GENERAL VERRILLI: But -- but with respect
9 to -- but with respect to the -- there is a
10 particularized interest here in that what we are talking
11 about is a question of whether 14,000 employees and
12 their families get access to this contraceptive
13 coverage.

14 JUSTICE KENNEDY: You -- you have exempted a
15 whole class of corporations and you've done so under
16 your view not because of RFRA.

17 GENERAL VERRILLI: So let me -- let me go to
18 that --

19 JUSTICE KENNEDY: Now, what -- what kind of
20 constitutional structure do we have if the Congress can
21 give an agency the power to grant or not grant a
22 religious exemption based on what the agency determined?
23 I recognize delegation of powers rules are somewhat more
24 abundant insofar as their enforcement in this Court.
25 But when we have a First Amendment issue of -- of this

1 consequence, shouldn't we indicate that it's for the
2 Congress, not the agency to determine that this
3 corporation gets the exemption on that one, and not even
4 for RFRA purposes, for other purposes.

5 GENERAL VERRILLI: And, Your Honor, I do
6 think that it was appropriate for the agency, in
7 exercising its delegated authority here, to take into
8 account the special solicitude that under our
9 constitutional order churches receive. And it's
10 important to understand, and I want to walk through
11 the -- this question of exemptions very carefully
12 because I think there's a lot of confusion here that
13 needs to be cleared up, that all that the -- all that
14 the government has done is say that churches, because of
15 that special solicitude, which the Court recognized in
16 Hosanna-Tabor, churches get an exemption.

17 The nonprofit religious organizations don't
18 get an exemption. There's an accommodation there
19 provided, but that accommodation results in the
20 employees receiving access to this -- to the
21 contraceptive coverage, so that doesn't diminish the
22 government's compelling interest.

23 The Tenth Circuit and my friends on the
24 other side have relied on this idea that employers with
25 fewer than 50 employees are somehow exempt.

1 JUSTICE KENNEDY: But you gave this
2 exemption, according to your brief, without reference to
3 the policies of RFRA. What -- what were the policies
4 that you were implementing?

5 GENERAL VERRILLI: Well, with respect to --
6 as I said, with respect to the churches, it was the
7 special solicitude that churches receive under our
8 Constitution under the First Amendment.

9 But with respect -- now with respect to the
10 employers 50 and under, it's just not right to say that
11 there's any kind of an exemption. If they offer health
12 insurance, they're subject to exactly the same
13 per-employee, per-day penalty as larger corporations,
14 exactly the same risk of Labor Department enforcement,
15 exactly the same risk of an ERISA suit by the plan
16 beneficiaries. There is no possible way to look at the
17 statutory scheme and conclude there is an exemption
18 there.

19 CHIEF JUSTICE ROBERTS: What about the
20 grandfathered plans?

21 GENERAL VERRILLI: Yes. Let me talk about
22 the grandfathered plans.

23 CHIEF JUSTICE ROBERTS: Well, just before
24 you -- so one thing I'd like you to address, the dispute
25 arose with Mr. Clement about how long they were going to

1 be in effect. Can you make a representation to us about
2 how long the grandfathering is going to be in effect?

3 GENERAL VERRILLI: I -- I can't give you a
4 precise figure as to -- there's a clear downward
5 trajectory. There's significant movement downward every
6 year in the numbers. There's every reason to think
7 that's going to continue. I can't give you a precise
8 time when that is going to be --

9 CHIEF JUSTICE ROBERTS: Can you give me an
10 approximate time, if not a precise one?

11 GENERAL VERRILLI: I -- I can't give you a
12 representation of exactly how low that number is going
13 to go and exactly how long it's going to take. But I
14 think what you're talking about is a period in which
15 that number is going to go to a very, very low level
16 over a several year period.

17 CHIEF JUSTICE ROBERTS: Well, if you can't
18 tell us, and I don't fault you for not being able to
19 tell us, when the grandfathering is going to end,
20 shouldn't we assume in our analysis that it is current
21 and, as far as we can tell, not going to end?

22 GENERAL VERRILLI: No. I don't that's
23 right, Your Honor. And I think -- let's -- let's look
24 at this, if we could, in toto. That with respect to
25 grandfathering, it's to be expected that employers and

1 insurance companies are going to make decisions that
2 trigger the loss of that so-called grandfathered status
3 under the -- under the governing regulation.

4 JUSTICE ALITO: Isn't it true with respect
5 to the grandfathered plans that the regulations required
6 immediate compliance with certain requirements, but not
7 with preventive care requirements; isn't that right?
8 Let me read you what HHS said in the regulation: "With
9 certain particularly significant protections,
10 particularly significant protections, Congress required
11 grandfathered health plans to comply with a subset of
12 the Affordable Care Act's health reform provisions. On
13 the other hand, grandfathered health plans are not
14 required to comply with certain other requirements of
15 the Affordable Care Act; for example, the requirement
16 that preventive health services be covered without any
17 cost sharing."

18 So isn't HHS saying there, quite
19 specifically, these, in our view, are not within this
20 subset of particularly significant requirements as to
21 which there must be immediate compliance?

22 GENERAL VERRILLI: Well, the -- the question
23 would be whether there's a compelling interest in
24 compliance with these requirements. And I -- I'd like
25 to make two points in response to Your Honor's question.

1 First with respect to this issue of delay, which I
2 think, Mr. Chief Justice, your question raised, and my
3 friend on the other side has put a lot of weight on, I'd
4 refer the Court to the ADA. I don't think anybody would
5 doubt that the Americans with Disabilities Act advances
6 interest of the highest order. But when Congress
7 enacted that, it put a two-year delay on the
8 applicability of the discrimination provision.

9 CHIEF JUSTICE ROBERTS: Well, isn't that
10 because you're talking about building ramps and things
11 like that?

12 GENERAL VERRILLI: No. No, Your Honor.
13 There's an even longer delay with respect to those kinds
14 of provisions, but it's just a basic prohibition of
15 discrimination two-year delay, and no one would doubt
16 there's a compelling interest here. And with -- and
17 take -- take Title VII. My friends on the other side
18 have said, well, this is different because there's so
19 many more people who are going to not have this coverage
20 under the grandfathered plan. But with respect to Title
21 VII, of course, it's still the case that -- that
22 employers with 15 or fewer people are not subject to
23 that law, and that's 80 percent of the employers in the
24 country. And if you run the math, that's -- it's at
25 least 80 percent -- that's -- it's going to be somewhere

1 between 10 and 22 million people who are not within the
2 coverage. No one would say that because the coverage is
3 incomplete in that respect, that Title VII -- enforcing
4 Title VII doesn't advance --

5 CHIEF JUSTICE ROBERTS: Those were
6 decisions -- those were decisions that Congress made,
7 right?

8 GENERAL VERRILLI: Yes.

9 CHIEF JUSTICE ROBERTS: Well, the
10 grandfathering is not a decision that Congress made, is
11 it?

12 GENERAL VERRILLI: Well, the way in which
13 it's implemented is a decision that the agency has made,
14 that's true. But even with respect to the preventive
15 services, I don't think anyone would say that there's
16 not a compelling interest in advancing colorectal cancer
17 screening and immunizations and the things that the
18 preventive services provisions provide in addition to
19 contraceptive coverage. I just think this is a
20 compelling interest under any understanding of the term.

21 JUSTICE BREYER: I just want -- before you
22 get to this point, and my question reflects no point of
23 view at all on my behalf. I just -- but I took
24 Mr. Clement, one of his points, which I thought was an
25 important one. He says there are some people here who

1 strongly object to helping with abortions which include
2 abortifacient contraceptives. Everybody says, yes, they
3 do object to that and that's sincere. So he's not
4 saying this, but I might.

5 But there is a compelling interest in
6 women's health and in the health of the family, and
7 they're not having a religious objection to taking it.
8 And so the government has said provide it.

9 Then he says, but there is a less
10 restrictive way, and the less restrictive way is the
11 government pays for it. Says it wouldn't cost much.
12 You'd have to have another piece of paper that would go
13 to the insurance company that would say, insofar as your
14 employer has a sincere objection against paying this,
15 the government will pay for it.

16 Now, what I want to hear, and this is not
17 coming from any point of view, I want to hear your
18 precise answer to that kind of argument.

19 GENERAL VERRILLI: Yes. They did argue -- I
20 will point out, for the first time at the podium this
21 morning -- that a less restrictive means would be to
22 extend the accommodation that currently exists --

23 JUSTICE BREYER: I'm not interested in
24 whether they made the argument sooner or later. What I
25 want to hear from you is I want to hear -- and it's

1 not -- you've thought about this. I want to hear your
2 answer to that kind of argument.

3 GENERAL VERRILLI: Well --

4 JUSTICE BREYER: I want to be sure you have
5 a chance to give it.

6 GENERAL VERRILLI: The answer -- I think
7 there are two answers to it. Assuming it's before the
8 Court -- and I'm going to answer your honest question
9 directly, but I do want to make a prefatory point here,
10 which is that under the law, under *Ashcroft v. ACLU*, for
11 example, the burden on the government is to show that
12 proposed less restrictive alternatives are not equally
13 effective. If they don't propose it, we don't have a
14 burden to refute it.

15 Having said that, we can refute it. Now,
16 there are two -- and there are two ways. The first is,
17 they claim that they don't think that the accommodation
18 is a less restrictive means, I take it, because -- or
19 they haven't raised it before today, because they
20 believe that RFRA would require exemptions to that too,
21 such that if you were -- if you were to provide the
22 accommodation in which the insurance company comes in
23 and provides the contraception if the employer signs the
24 form, they would say that that -- signing the form also
25 makes them complicit in the central activity, and that

1 therefore RFRA provides an exemption there, too.

2 And of course the test is whether the
3 proposed alternative advances the government's
4 interests as effectively. And if it is going to be
5 subject to exactly the same RFRA objections by exactly
6 the same class of people asking for it, it's not going
7 to serve the government's interest as effectively
8 because the RFRA exemption will result in no coverage
9 there.

10 The second point being that --

11 JUSTICE SCALIA: So don't make them sign a
12 piece of paper.

13 GENERAL VERRILLI: Well, whether they sign
14 the piece of paper or not, if they make the RFRA claim
15 there, which they have with respect to that
16 accommodation, it will result in it being less effective
17 in terms of accomplishing the compelling interest. In
18 addition --

19 JUSTICE ALITO: Well, we can ask Mr. Clement
20 what his position is on this. But you say they have
21 already asserted that it would be inconsistent with RFRA
22 as they understand it to provide for a for-profit
23 corporation, like the ones involved here, the sort of
24 accommodation that HHS has extended to so-called
25 religious nonprofits, perhaps with the modification that

1 was included in our stay order in the Little Sisters
2 case. Have they taken a position on that?

3 GENERAL VERRILLI: You'll have to ask them.
4 I don't think they have. But they have studiously
5 avoided arguing this as a less restrictive alternative,
6 and I take it it's because their theory, at least, would
7 lead one to the conclusion you would have to provide a
8 RFRA objection. But now the -- yes, thank you,
9 Mr. Chief Justice.

10 The second point is that you're talking
11 about a very open-ended increase in the cost to the
12 government. Now, we don't know how much that cost would
13 be. The reason is because, since this wasn't litigated
14 in the lower courts, there's not a record on it. So I
15 can't tell you what that -- what that increased cost is
16 going to be, but it could be quite considerable.

17 JUSTICE SCALIA: You're talking about, what,
18 three or four birth controls, not all of them, just
19 those that are abortifacient. That's not terribly
20 expensive stuff, is it?

21 GENERAL VERRILLI: Well, to the contrary.
22 And two points to make about that. First, of course
23 the -- one of the methods of contraception they object
24 to here is the IUD. And that is by far and away the
25 method of contraception that is most effective, but has

1 the highest upfront cost and creates precisely the kind
2 of cost barrier that the preventive services provision
3 is trying to break down.

4 JUSTICE ALITO: I thought that -- I was
5 taken by your answer. I thought it was the government's
6 position that providing coverage for the full range of
7 contraceptives and other devices and drugs that are
8 covered here is actually financially neutral for an
9 insurance company, that that reduces other costs that
10 they would incur.

11 GENERAL VERRILLI: It is for the insurance
12 company, but for the woman who is going to not get the
13 benefit of the statute if the exemption is granted --

14 JUSTICE ALITO: No. No. If she -- if she
15 has the coverage through the insurance company but the
16 employer has nothing to do with arranging for that.

17 GENERAL VERRILLI: Well, so, in other words,
18 if they haven't raised a RFRA objection to the
19 alternative, but that -- but as I said, you know, the
20 logic of their position is that you would get a RFRA
21 objection. It can't be --

22 JUSTICE BREYER: Still, I want to get --
23 press this a little further, and I don't want you simply
24 to just agree with what I'm about to say.

25 GENERAL VERRILLI: Don't worry.

1 (Laughter.)

2 JUSTICE BREYER: No, I mean -- I mean, after
3 all, somebody, a taxpayer, might say, "I don't want to
4 pay for this small war." And it would be a religious
5 ground, and it would be very, very little money, in
6 fact, that you take from him. Or the church might say,
7 "I want a Sunday morning reduction in the cost of
8 municipal parking." And by the way, that will not only
9 not cost the government anything, they'll make money
10 because nobody parks there on Sunday, particularly with
11 this high a fee.

12 Now, I'm thinking of -- I'm trying to figure
13 out where this case fits in that spectrum because I
14 think the answer to the first two questions is no. And
15 I know, so you're just going to agree, and that's what I
16 don't want. I want to understand your thinking on that.

17 GENERAL VERRILLI: On that point, I think
18 that question plugs into our view of what the
19 substantial burden test requires, that their view of
20 substantial burden is if you have a sincere religious
21 belief and there is any law with a meaningful penalty
22 that imposes on you pressure to do something
23 inconsistent with your belief, then you may pass the
24 substantial burden test.

25 I think the problem with that test as they

1 formulate it, is that under the two hypotheticals that
2 you just gave, Justice Breyer, you've got a substantial
3 burden in those situations, because if you don't pay the
4 tax you can go to jail, for example.

5 And so we think the substantial burden
6 analysis has got to be more strenuous than that. It's
7 got to incorporate principles of attenuation and
8 proximate cause, and that when you think about this case
9 where the requirement is to purchase insurance which
10 enables actions by others, that you're really closer to
11 the tax situation than to imposing a direct obligation
12 to act.

13 So that's how we would think about that
14 issue. But now, with respect to --

15 JUSTICE ALITO: Mr. -- General Verrilli,
16 isn't that really a question of theology or moral
17 philosophy, which has been debated for -- by many
18 scholars and adherents to many religions. A does
19 something that B thinks is immoral. How close a
20 connection does there have to be between what B does
21 that may have some -- that may provide some assistance
22 to A in order for B to -- to be required to refrain from
23 doing that -- that action.

24 GENERAL VERRILLI: It's true that it's a
25 difficult question. But it isn't --

1 JUSTICE ALITO: It is a religious question
2 and it's a moral question. And you want us to provide a
3 definitive secular answer to it?

4 GENERAL VERRILLI: No, but I do think the
5 problem, Justice Alito, is that this Court has
6 recognized, and certainly the courts of appeals have
7 recognized, that there is a difference. You accept the
8 sincerity of the belief, but the Court still has to make
9 a judgment of its own about what constitutes a
10 substantial burden, or otherwise, for example, the tax
11 thing would be a substantial burden. Or we cited a D.C.
12 Circuit case in which prisoners objected to giving DNA
13 samples and the court said: We accept the sincerity of
14 that belief, but it's up to us to decide whether that's
15 a actually substantial burden.

16 In the Bowen case in this Court, the Court
17 accepted the sincerity of the belief that the use of the
18 child's Social Security number would offend religious
19 belief and commitments, but said they still had to make
20 a judgment about whether that was a substantial burden.

21 So it does have to be, with all due respect,
22 part of the analysis.

23 JUSTICE KENNEDY: I still don't understand
24 how HHS exercised its judgment to grant the exemption to
25 nonreligious corporations if you say it was not

1 compelled by RFRA.

2 GENERAL VERRILLI: I don't think --

3 JUSTICE KENNEDY: Then it must have been
4 because the health care coverage was not that important.

5 GENERAL VERRILLI: It didn't grant an
6 exemption to any nonreligious organizations, Justice
7 Kennedy. It granted an exemption to churches, and that
8 was it. With respect to religious nonprofits, it
9 constructed an accommodation, but the accommodation
10 delivers the contraceptive coverage to the employees of
11 the nonprofits. It just does it through an indirect
12 means. But there is no diminution of the -- there's no
13 basis for questioning the government's interest with
14 respect to that accommodation because the employees get
15 the coverage, just as they would --

16 CHIEF JUSTICE ROBERTS: Well, but that of
17 course is an issue that's being hotly litigated right
18 now, right? Whether the employees can get the coverage
19 when you're talking about the religious organizations.

20 GENERAL VERRILLI: Well, that's exactly why
21 I think you can't look to that as a less restrictive --
22 that accommodation, extending that accommodation to
23 for-profit corporations. As a less restrictive
24 alternative. Precisely because it's being hotly
25 litigated whether RFRA will require exemptions to that,

1 as well.

2 CHIEF JUSTICE ROBERTS: But you're
3 relying -- you're relying on it to make your point with
4 respect to the accommodation, and then you're
5 criticizing your friend for relying on the same thing in
6 making his points.

7 GENERAL VERRILLI: Well, I think -- I think
8 what Justice Kennedy -- I took Justice Kennedy to be
9 asking me, Mr. Chief Justice, was whether the
10 government's choice to provide that accommodation
11 reflected a judgment on the part of the government that
12 this was something less than a compelling interest, and
13 I don't think that inference is possible, because the
14 government was trying to use that accommodation to
15 ensure that the contraceptives were delivered. So, with
16 all due respect, I don't think there is an inconsistency
17 there.

18 And I -- and I do think, if I could, with
19 respect to this issue of whether there are exemptions
20 that defeat a compelling interest, that I submit would
21 be a very dangerous principle for this Court to adopt in
22 the form that my friends on the other side have offered
23 it, because not only would you then be in a position
24 where it would be very hard to see how Title VII
25 enforcement could be justified by compelling interest in

1 response to a RFRA objection, ADA enforcement, FMLA
2 enforcement, all kinds of things. And I do think --

3 JUSTICE GINSBURG: Title VII was passed
4 before 1993, so it wouldn't apply -- RFRA wouldn't apply
5 to Title VII.

6 GENERAL VERRILLI: Well, I think -- with all
7 due respect, Justice Ginsburg, I think you could claim a
8 RFRA exemption from Title VII. And the problem here
9 would be that -- and I think one of the things that's
10 significant about the position that my friends on the
11 other side are taking here, is that with respect to
12 exemptions, for example, from the Title VII requirement
13 against discrimination on the basis of religion and
14 hiring, Congress made a quite clear judgment to provide
15 a very narrow exemption: Churches and religious
16 educational institutions and religious associations, and
17 that's it. Nobody else can claim an exemption under
18 Title VII.

19 JUSTICE SCALIA: Except that they passed
20 RFRA after that. That made a lot of sense. But the
21 question is they passed RFRA after that.

22 GENERAL VERRILLI: But I think the further
23 question, Your Honor, is whether you would interpret
24 RFRA in a manner where you would essentially obliterate
25 that carefully crafted -- or what Congress meant to do

1 was to obliterate that carefully crafted exemption and
2 instead say that every for-profit corporation could make
3 a request like that.

4 CHIEF JUSTICE ROBERTS: Well, if Congress
5 feels as strongly about this as you suggest, they can
6 always pass an exemption, an exception to RFRA, which
7 they have done on other occasions. And they haven't
8 done it here.

9 GENERAL VERRILLI: Well, with all due
10 respect, Your Honor, I think you could make the same
11 argument either way in this case, that the question here
12 is what Congress thought it was doing in 1993, and we
13 don't think, given the long history and the fact that
14 not only do you have no case in which a for-profit
15 corporation ever had a successful --

16 CHIEF JUSTICE ROBERTS: Well, we've already
17 discussed that there is no case holding that they can't,
18 right?

19 GENERAL VERRILLI: In addition, if you look
20 at the history of exemptions and accommodations in our
21 legislation, State and Federal legislation may extend to
22 churches and religious nonprofits, and that's -- and
23 individuals. And that's where the line has been drawn
24 in our legislation historically. There just is nothing
25 in our current --

1 JUSTICE KENNEDY: Under your view, a profit
2 corporation could be forced -- in principle, there are
3 some statutes on the books now which would prevent it,
4 but -- could be forced in principle to pay for
5 abortions.

6 GENERAL VERRILLI: No. I think, as you
7 said, the law now -- the law now is to the contrary.

8 JUSTICE KENNEDY: But your reasoning would
9 permit that.

10 GENERAL VERRILLI: Well, I think that -- you
11 know, I don't think that that's -- I think it would
12 depend on the law and it would depend on the entity. It
13 certainly wouldn't be true, I think, for religious
14 nonprofits. It certainly wouldn't be true for a church.

15 JUSTICE KENNEDY: I'm talking about a profit
16 corporation. You say profit corporations just don't
17 have any standing to vindicate the religious rights of
18 their shareholders and owners.

19 GENERAL VERRILLI: Well, I think that if it
20 were for a for-profit corporation and if such a law like
21 that were enacted, then you're right, under our theory
22 that the for-profit corporation wouldn't have an ability
23 to sue. But there is no law like that on the books. In
24 fact, the law is the opposite.

25 CHIEF JUSTICE ROBERTS: I'm sorry, I lost

1 track of that. There is no law on the books that does
2 what?

3 GENERAL VERRILLI: That makes a requirement
4 of the kind that Justice Kennedy hypothesized. The law
5 is the opposite.

6 CHIEF JUSTICE ROBERTS: Well, flesh it out a
7 little more. What -- there is no law on the books that
8 does what?

9 GENERAL VERRILLI: That requires for-profit
10 corporations to provide abortions.

11 JUSTICE KENNEDY: What if a law like that --

12 CHIEF JUSTICE ROBERTS: Isn't that what we
13 are talking about in terms of their religious beliefs?
14 One of the religious beliefs is that they have to pay
15 for these four methods of contraception that they
16 believe provide abortions. I thought that's what we had
17 before us.

18 GENERAL VERRILLI: It is their sincere
19 belief and we don't question that. But I will say, and
20 I do think this is important and I say it with all
21 respect, that that is how they -- that is the judgment
22 that they make. It is not the judgment that Federal law
23 or State law reflects. Federal law and State law which
24 does -- which do preclude funding for abortions don't
25 consider these particular forms of contraception to be

1 abortion.

2 With all due respect, I would say that I
3 think that, you know, we've got about 2 million women
4 who rely on the IUD as a method of birth control in this
5 country. I don't think they think they are engaged in
6 abortion in doing that. It is their belief. It's
7 sincere. We respect it.

8 But it isn't a belief that we think is
9 reflected in Federal or State law or our traditions of
10 where that line is drawn. And so -- and I do think that
11 that is what makes this a difficult case. I agree.

12 And if you disagree with our position at the
13 threshold that corporations -- that even though you have
14 a situation, and we acknowledge you can have situations,
15 in which a tightly knit group of -- a small group of
16 tightly knit individuals own and operate a corporation
17 where there is appeal to that, to the argument that they
18 ought to recognize a claim of exercising religion in
19 those circumstances.

20 The problem, I would submit, is with the
21 implications of doing it, the implications for
22 entanglement and making the judgments when you move past
23 that group, the administrability problems, and the
24 problems of inviting the kinds of claims that are
25 predictably going to impose harms on third parties.

1 JUSTICE ALITO: What about the implications
2 of saying that no for-profit corporation can raise any
3 sort of free exercise claim at all and nobody associated
4 with the for-profit corporation can raise any sort of
5 free exercise claim at all?

6 Let me give you this example. According to
7 the media, Denmark recently prohibited kosher and halal
8 slaughter methods because they believe that they are
9 inhumane. Now, suppose Congress enacted something like
10 that here. What would the -- what would a corporation
11 that is a kosher or halal slaughterhouse do? They would
12 simply -- they would have no recourse whatsoever. They
13 couldn't even get a day in court. They couldn't raise a
14 RFRA claim. They couldn't raise a First Amendment
15 claim.

16 GENERAL VERRILLI: Well, I'm not sure they
17 couldn't raise a First Amendment claim, Justice Alito.
18 I think if you had a targeted law like that, that
19 targeted a specific religious practice, that -- I don't
20 think it is our position that they couldn't make a free
21 exercise claim in that circumstance and so --

22 JUSTICE ALITO: Why is that --

23 JUSTICE KENNEDY: Well, but you're getting
24 away from the hypothetical. Say -- Justice Alito's
25 hypothetical was that the impetus for this was humane

1 treatment of animals. There was no animus to religion
2 at all, which in the Church of Lukumi, there was an
3 animus to the religion. So we're taking that out of the
4 hypothetical.

5 JUSTICE ALITO: Exactly.

6 GENERAL VERRILLI: Right. Well, I think if
7 it were targeted only at the practices of the -- the
8 kosher and halal practices, then I think you would have
9 an issue of whether it's a targeted law or not. But
10 even if it is --

11 JUSTICE ALITO: Well, they say no animal may
12 be slaughtered unless it's stunned first, unless the
13 animal is rendered unconscious before it is slaughtered.

14 GENERAL VERRILLI: Well, I think in that
15 circumstance, you would have, I think, an ability for
16 customers to bring suit. I think you might recognize
17 third party standing on behalf of the corporation -- on
18 the corporations, on behalf of customers. So a suit
19 like that could be brought.

20 But even if you disagree with me at the
21 threshold, even if you disagree with us with respect to
22 the kinds of risks that we think you will be inviting if
23 you hold that for-profit corporations can bring these
24 claims, when you get to the compelling interest
25 analysis, the rights of the third party employees are at

1 center stage here. And that's -- I think that's the
2 point of critical importance in thinking about this
3 case. And I think, frankly, the point that has been
4 just left on the sidelines by my friends on the other
5 side.

6 The consequence of holding here that the
7 RFRA exemption applies is not a situation like ones in
8 which this Court under the Free Exercise Clause or under
9 RFRA have recognized exemptions in the past. Those have
10 always been situations where it's a relationship between
11 the individual and the government and granting the
12 exemption might result in the government not being able
13 to enforce the law with respect to the individual, but
14 --

15 JUSTICE BREYER: I mean, the point that
16 Justice Alito was making is that -- take five Jewish or
17 Muslim butchers and what you're saying to them is if
18 they choose to work under the corporate form, which is
19 viewed universally, you have to give up on that form the
20 Freedom of Exercise Clause that you'd otherwise have.

21 Now, looked at that way, I don't think it
22 matters whether they call themselves a corporation or
23 whether they call themselves individuals. I mean, I
24 think that's the question you're being asked, and I need
25 to know what your response is to it.

1 GENERAL VERRILLI: Well, I think our
2 response is what the Court said in Part 3 of the Lee
3 opinion, which is that once you make a choice to go into
4 the commercial sphere, which you certainly do when you
5 incorporate as a for-profit corporation, you are making
6 a choice to live by the rules that govern you and your
7 competitors in the commercial sphere.

8 But even if you disagree with me about that,
9 what I'd like to leave the Court with, is what I think
10 is the most important point here, is that if this
11 exemption were granted, it will be the first time under
12 the Free Exercise Clause or under RFRA in which this
13 Court or any court has held that an employer may take --
14 may be granted an exemption that extinguishes
15 statutorily-guaranteed benefits of fundamental
16 importance.

17 Lee came to exactly the opposite conclusion
18 with respect to Social Security benefits, that you --
19 that it was imperative that the employee's interest be
20 protected. And that is the fundamental problem with the
21 position that my friends on the other side raise here,
22 that they leave the third-party employees entirely out
23 of the equation.

24 JUSTICE SCALIA: That's okay for
25 not-for-profit corporations to do that with respect to

1 all of their employees, and some of them are pretty big
2 operations --

3 GENERAL VERRILLI: No.

4 JUSTICE SCALIA: -- that's okay there?

5 GENERAL VERRILLI: No, we don't think that.

6 We don't -- we're not drawing a line between non-profits
7 and profits.

8 JUSTICE SCALIA: They can make -- you allow
9 them to make this religious objection, don't you?

10 GENERAL VERRILLI: No. No. Religious
11 non-profits get an accommodation in which their
12 employees get the contraception. But we are not drawing
13 a line between for-profit and profit.

14 JUSTICE SCALIA: But they don't have to pay
15 for it, right?

16 GENERAL VERRILLI: The --

17 JUSTICE SCALIA: And you could set that up
18 this way, that these people don't have to pay for it.

19 GENERAL VERRILLI: Well, as I've said a
20 couple of times, they haven't asked for that until this
21 morning. But the fundamental point here is that you
22 would be extinguishing statutorily-guaranteed health
23 benefits of fundamental importance to these employees,
24 and that is something that this Court has never done.
25 And I submit that Congress can't have thought it was

1 authorizing it when it enacted RFRA in 1993.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, General.

4 Mr. Clement, four minutes.

5 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

6 ON BEHALF OF PRIVATE PARTIES

7 MR. CLEMENT: Thank you, Mr. Chief Justice.

8 Just a few points in rebuttal. Let me start
9 with the Abortion Conscious Clause. It's -- because it
10 tells you something about where Congress has drawn the
11 line and it tells you the consequences of the
12 government's position. Historically, those conscious
13 provisions have applied to all medical providers,
14 including for-profit medical providers. But we learned
15 today that as far as the government's concerned, that's
16 just Congress' judgment. If Congress changes its
17 judgment and says that a for-profit medical provider has
18 to provide an abortion, RFRA doesn't apply. That, with
19 all due respect, cannot be what Congress had in mind
20 when it passed RFRA. They also suggested if a kosher
21 market takes the trouble to incorporate itself, then it
22 has no free exercise claims at all.

23 Now, you can go back and read the Crown
24 kosher case. I took it as common ground, that all nine
25 justices thought that if the Massachusetts law there had

1 forced Crown kosher to be open on Saturday, that that
2 would be a free exercise claim notwithstanding the
3 incorporation.

4 The second point I want to talk about is the
5 least restrictive alternatives. In a colloquy with
6 Justice Scalia, the Solicitor General points out that
7 yeah, well, it's a little bit different from the
8 pre-Smith law because now you have the less restrictive
9 alternatives analysis.

10 That's not a small difference. That's a
11 major difference. And it's really the easiest way to
12 rule against the government in this case. Because you
13 have a unique situation here where their policy is about
14 a government -- a subsidy for a government- preferred
15 health care item, and the question is who pays? The
16 government paying or a third-party insurer paying is a
17 perfectly good least restrictive alternative.

18 JUSTICE SOTOMAYOR: So we go back to the
19 start of my question, that would be essentially the same
20 for vaccines, blood transfusions, non-pork products, the
21 government has to pay for all of the medical needs that
22 an employer thinks or claims it has a religious
23 exemption to?

24 MR. CLEMENT: Not necessarily,
25 Justice Sotomayor. It will depend on how you --

1 JUSTICE SOTOMAYOR: Because those things are
2 more important?

3 MR. CLEMENT: No, not because they're
4 more --

5 JUSTICE SOTOMAYOR: It's really the amount
6 of money --

7 MR. CLEMENT: -- important. But the easiest
8 way to distinguish them is if the government's already
9 provided this accommodation for religious employers.

10 JUSTICE SOTOMAYOR: Well, but they --

11 MR. CLEMENT: And with all due respect --

12 JUSTICE SOTOMAYOR: -- they make exemptions
13 for vaccines, presumably, to some people on some basis,
14 but we have a tax code that applies to everybody, but we
15 have a million exemptions.

16 Does the creation of the exemption relieve
17 me from paying taxes when I have a sincere religious
18 belief that taxes are immoral?

19 MR. CLEMENT: I think Lee says that taxes
20 are different and not all exemptions are created equal,
21 because some exemptions undermine the compelling
22 interest. Now, the reason --

23 JUSTICE ALITO: Isn't there a Federal
24 program that pays for vaccines for any children who are
25 not covered by insurance for those vaccines?

1 MR. CLEMENT: There is, Justice Alito. Of
2 course, there's also Title X, which provides for
3 contraception coverage, which is another least
4 restrictive alternative.

5 But I do want to get on the table that it is
6 not true, that we have not suggested that the
7 accommodation provided to religious employers, like
8 nonprofit hospitals, that's not something I invented at
9 the podium.

10 If you look at page 58 of our brief, the red
11 brief, we specifically say that one of the least
12 restrictive alternatives would be -- the most obvious
13 least restrictive alternative is for the government to
14 pay for their favorite contraception methods themselves.

15 Later in that paragraph, the only full
16 paragraph on the page, we say, "And indeed, the
17 government has attempted something like that with
18 respect to certain objective employers -- objective
19 employees -- employers," and we cite the Federal
20 Register provision where there is the accommodation
21 provision.

22 JUSTICE SOTOMAYOR: Will your clients claim
23 that filling out the form, if -- you're saying they
24 would claim an exemption like the churches have already?

25 MR. CLEMENT: We haven't been offered that

1 accommodation, so we haven't had to decide what kind of
2 objection, if any, we would make to that. But it's
3 important to recognize that as I understand that
4 litigation, the objection is not to the fact that the
5 insurance or the provider pays for the contraception
6 coverage. The whole debate is about how much complicity
7 there has to be from the employer in order to trigger
8 that coverage. And whatever the answer is for Little
9 Sisters of the Poor, presumably you can extend the same
10 thing to my clients and there wouldn't be a problem with
11 that.

12 If I could have just one second more to say
13 that the agency point that Justice Kennedy has pointed
14 to is tremendously important, because Congress spoke, it
15 spoke in RFRA. Here the agency has decided that it's
16 going to accommodate a subset of the persons protected
17 by RFRA. In a choice between what Congress has provided
18 and what the agency has done, the answer is clear.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Counsel, the case is submitted.

22 (Whereupon, at 11:39 a.m., the case in the
23 above-titled matter was submitted.)

24

25

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