No. 13-3853

In the United States Court Of Appeals
for the Seventh Circuit

University of Notre Dame,
Plaintiff-Appellant
v.
Kathleen Sebelius, in her official capacity as Secretary,
U.S. Department of Health and Human Services, et al.,
Defendants-Appellees
v.
Jane Doe 1, Jane Doe 2, and Jane Doe 3,
Intervenors-Appellees

On Appeal from the United States District Court
for the Northern District of Indiana
District Court Case No. 3:13-cv-01276-PPS
The Honorable Philip P. Simon

BRIEF FOR THE INTERVENORS-APPELLEES JANE DOES 1-3

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DISCLOSURE STATEMENT

Pursuant to 7th Cir. R. 26.1, the undersigned makes the following disclosures:

1. The full name of every party that the attorney represents in this case: Jane Doe 1, Jane Doe 2, Jane Doe 3.[1]

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this case: Americans United for Separation of Church and State.

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[1] Pursuant to the Court's order of January 14, 2014 (Doc. No. 22), Jane Does 1-3 submit this brief using pseudonyms.

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INTRODUCTION

The University of Notre Dame ("the University") seeks an exemption from federal regulations enacted to ensure that its students and employees have access to essential reproductive health services, including contraceptives. Yet the University insists that "[t]he subject matter of this lawsuit is *not* access to contraceptives." Univ. Opp. to Mot. to Intervene (Doc. No. 17) at 8 (emphasis in original). Rather, according to the University, all that matters is the University's own purported religious injury. *Id*.

The University's inability to see or acknowledge the interests of others has led it to file suit without first considering how it might preserve its religious exercise without compromising the needs of its students and employees. It overlooks the fact that it can discontinue its health-insurance plans and subsidize the coverage that women obtain in the marketplace. It distorts the regulations, claiming that an objection is tantamount to an endorsement. It seeks to hijack the government's provision of healthcare coverage to women affected by Notre Dame's objection. And it asks the Court to disregard the compelling need for integration of students' access to contraceptives into their broader health-insurance plans. If the Court were to accept these invitations, the Religious Freedom Restoration Act ("RFRA") would have been transformed into a trump card to be played by the University at will, against an opponent that never has any chance of prevailing.

But RFRA is not a litigation device to be wielded by those who have failed first to pursue—or even to consider—lawful alternatives to incurring a religious

injury. Where such avenues lie open and unaddressed, as they do here, a litigant has failed to demonstrate why it is "force[ed]. . . to do what [its] religion tells [it] . . . not [to] do." *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013). Furthermore, the law neither disregards interests as weighty as women's access to important health services, nor privileges religious concerns over important secular interests. Nor does *Korte* counsel that result. The University has not demonstrated its entitlement to a preliminary injunction.

JURISDICTIONAL STATEMENT

Pursuant to 7th Circuit Rule 28(b), Intervenors state that the University's jurisdictional summary is complete and correct.

STATEMENT OF ISSUES

This brief focuses on the University's RFRA claim. Accordingly, it addresses the following issues:

(1) Does RFRA entitle the University of Notre Dame to be exempted from a requirement to submit a form specifying its objection to the coverage of contraceptives before it can omit such coverage from its students' health-insurance plan?

(2) Does RFRA entitle the University of Notre Dame to be exempted from a requirement to submit a form specifying its objection to the coverage of contraceptives before it can omit such coverage from its employees' health-insurance plan?

(3) Does it violate the Establishment Clause to provide the University with an exemption that comes at the sacrifice of the University's students and employees' ability to procure health insurance that is essential to their wellbeing?

This brief does not address the University's arguments that the challenged regulations violate the Free Exercise, Free Speech, and Establishment Clauses. *See* Univ. Br. at 4-5, 40-52. Instead, the Intervenors support, and incorporate by reference, the arguments made by the United States in opposing those claims. *See* U.S. Br. 30-38.

STATEMENT OF THE CASE

A. Factual Background

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"), in order to "increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) ("NFIB"). The overall scheme is twofold, involving both employer and individual health-insurance plans. In both contexts, the ACA sets minimum coverage standards encompassing a broad range of preventive services. 42 U.S.C. § 300gg-13(a).

To aid in development of the preventive-care requirements, the Department of Health and Human Services ("HHS") asked the Institute of Medicine ("IOM") to research and make recommendations as to what "preventive services are necessary for women's health and well-being." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("IOM Report"),

http://bit.ly/19XiWHK.[2] Following an extensive survey of scientific literature and empirical data, IOM made public its findings and recommendations in 2011.

IOM concluded that women have different health needs than men, and that these needs often generate additional costs. *See id.* at 18; *see also* 155 Cong. Rec. at 29,070 ("Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.") (statement of Sen. Gillibrand); Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, http://go.cms.gov/1iDkoSB ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). IOM found that the disproportionately high cost of preventive services for women combines with the historical disparity in earning power between the sexes to create "cost-related barriers to . . . medical tests and treatments and to filling prescriptions for themselves and their families." IOM Rep. at 18-19 (citing Henry J. Kaiser Family Found., *Impact of Health Reform on Women's Access to Coverage and Care*, Focus on Health Reform (2010)); *see also* K.D. Bertakis et al., *Gender Differences in the Utilization of Health Care Services*, 49(2) J. of Fam. Prac., 147-52 (2000); Kristen H. Kjerulff et al., *The Cost of Being a Woman—a National Study of Health Care Utilization and Expenditures for Female-Specific Conditions*, 17 Womens Health Issues 1, 13-21 (2007).

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[2] All websites cited in this brief were last visited on January 26, 2014.

Among other things, IOM found that "even moderate copayments for preventive services" create a significant deterrent for women who might otherwise avail themselves of such services. IOM Rep. at 19 (citing Geetesh Solkanki et al., *The Direct and Indirect Effects of Cost-Sharing on the Use of Preventive Services*, 34 Health Servs. Res. 6, 1331-50 (2000)). Particularly in low-income populations, any cost-sharing requirements "pose barriers to care and result in reduced use of preventive and primary care services." IOM Rep. at 109. Many of the most effective contraceptive methods carry a high up-front cost, which further forecloses access for many women. *Id*. at 108. Indeed, barriers to preventative care "are so high that [women] avoid getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski).

As a result, the United States has a much higher rate of unintended pregnancy than other developed nations—accounting for *nearly half* of all pregnancies in the nation. IOM Rep. at 102. Every year, one in twenty American women experiences an unintended pregnancy, with women aged 18 to 24 most particularly affected. *See* IOM Rep. at 102. When faced with an unintended pregnancy, 42% of women choose to have an abortion, *id*. at 102, while other women carry to term a child for which they may be unprepared. Among the latter group, some may be unaware of their pregnancy at first and unwittingly cause harm to themselves or to their fetus, resulting in, for example, preterm births and babies with low birth weight. *Id*. at 103.

IOM's Committee on Women's Health Research concluded that these problems could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." *Id*. (quotation omitted); *see also* Heather Boonstra et al., *Abortion in Women's Lives*, Guttmacher Inst. (2006), http://bit.ly/19XmEB7 (detailing the correlation between increased contraceptive use and decreased rates of unintended pregnancy and abortion); John S. Santelli and Andrea J. Melnikas, *Teen Fertility in Transition: Recent and Historical Trends in the United States*, 31 Ann. Rev. of Pub. Health 371-83 (2010) (noting the correlation between increased contraceptive use and decreased teen pregnancy). The Report noted that when costs for contraception are reduced or eliminated altogether, women are more likely to rely on more effective methods. IOM Rep. at 109. It further noted that making contraceptives widely available could have additional benefits such as, for example, lowering the risk of certain kinds of cancer and other diseases for many women. *Id*. at 107. In light of these findings, IOM ultimately recommended including "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" as part of required preventive-services coverage without cost-sharing. *Id*. at 10-12.

The Health Resources and Services Administration adopted guidelines consistent with IOM's recommendations, thereby obligating group health plans to provide coverage for these preventive services without cost-sharing. 42 U.S.C. 300gg-13. Certain religious organizations—like Notre Dame—can obtain an

exemption from this requirement. The exemption takes the form of an indirect public option, whereby an organization opts out of providing contraceptive coverage, which is then provided by a religious objector's insurer with the government footing the bill through adjusted fees associated with participation in the healthcare exchange. 78 Fed. Reg. 39,873-74 (July 2, 2013). This exception—which will be referred to here as the "Accommodation," *see id.* at 39,874 (referring to provision as "Accommodations for Health Coverage Established or Maintained or Arranged by Eligible Organizations")—is the subject of this litigation.

Initially, the Accommodation was limited to houses of worship and analogous entities. *See Korte*, 735 F.3d at 661. In response to objections, HHS agreed to accept comment on revisions and postponed the effective date of the regulations until after the revisions were finalized. *Id.* at 661-62. Before the regulations were finalized, the University of Notre Dame brought its first lawsuit challenging the regulations—a suit that was dismissed as unripe. *See Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-253-RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012).

In July 2013, the government formally adopted the final Accommodation. Compl., AA15 ¶ 60.[3] At first, the University went about complying with the

[3] Whenever possible, citations to the record are to the appendices to the University's principal brief. Citations to documents in the Short Appendix are "SA__." Citations to documents in the Additional Appendix are "AA__." Other citations to the record are to "Doc. No. __," referencing the document number in the CM/ECF system. Page citations are to the document's original pagination, not to the CM/ECF-assigned pagination.

Accommodation. In its 2014 health-benefits summary, published in the fall of 2013, the University outlined how contraceptives would be made available pursuant to the Accommodation. *See* University of Notre Dame, *Open Enrollment Decision Guide* (2014 ed.), 14, http://bit.ly/1dEWX3p ("New: Contraceptive Coverage—Our third party administrator, Meritain Health, will be offering coverage for these services"); *see also* Sycamore Trust, *Yearend Campaign*, http://bit.ly/1cNO1Zc. In the minutes of its Faculty Senate meetings, as late as November 2013, the University maintained its intention to comply with the Accommodation. Minutes of the Faculty Senate, Nov. 5, 2013, http://bit.ly/1ht0BSp.

In October 2013, however, an alumni group wrote to Notre Dame's President, urging the University to litigate because of Notre Dame's "symbolic importance" to the cause, as well as "the availability of outstanding legal counsel." *See* William H. Dempsey, *Letter to Father John Jenkins*, http://bit.ly/1jiVh7G. Shortly thereafter, on December 3, 2013, the University filed suit. *See* Compl., AA1. The lawsuit came almost a year after the Accommodation was proposed, five months after it was finalized, and mere weeks before it was slated to go into effect. The alumni group later noted its role in the University's "last-minute decision to litigate." Sycamore Trust, *Yearend Campaign*, *supra*.

B. The Proceedings Below

With the Accommodation's implementation deadline fast approaching, the University's preliminary-injunction motion was briefed, argued, and decided within a span of less than two weeks. Dist. Ct. Op., SA8. Although the district court heeded the University's request for expedited consideration, it characterized the University's "excuses for late filing" as "a little hard to swallow." *Id.* at SA8-9. Notre Dame claimed that it needed the time to analyze the final regulations and the Accommodation, but it cited a March 2013 letter from the Office of the General Counsel of the United States Conference of Catholic Bishops that raised the very same objections raised in Notre Dame's Complaint. *Id.* at SA9. Because the University did not disclose that it initially had chosen to comply with the regulations, the district was "left to wonder why" "Notre Dame has in many ways created its own emergency." *Id.*

On the merits of the preliminary injunction, the district court held that Notre Dame was unlikely to succeed on its RFRA claim because it had not demonstrated a substantial burden. *Id.* at SA24-25. The district court reasoned that the University "is not being asked to do or say anything it doesn't already do, and wouldn't do regardless of the outcome of this case; the only thing that changes under the healthcare law is the actions of third parties." *Id.* at SA1-2. Having concluded that there had been no showing of a substantial burden, the court declined to apply strict scrutiny. *Id.* at SA25. The court also rejected the University's Free Exercise, Free Speech, and Establishment Clause challenges to

the regulatory scheme. *Id.* at SA25-36. In balancing the equities, the district court concluded that "the low likelihood of Notre Dame's success on the merits tips the sliding scale towards denial of the preliminary injunction." *Id.* at SA39.

C. Prior Proceedings in This Court

The University immediately appealed from the district court's decision. Not. of Interlocutory Appeal (Doc. No. 43). It also moved for an emergency injunction pending appeal, arguing that it had scant days before it would be forced to "aid[ ] and abet[ ] a crime" against its religious faith. Univ. Emergency Mot. for Inj. Pending Appeal (Doc. No. 3-1) at 19. This Court rejected that motion, but it expedited the briefing schedule. Order (Doc. No. 11).

Shortly thereafter, Jane Does 1-3 moved to intervene on appeal. Mot. to Intervene (Doc. No. 12). The Intervenors are women who rely on the University's health insurance and who will be unable to afford contraceptive services if the University prevails. *Id.* at 1. This Court granted their motion to intervene over the University's objections. Order (Doc. No. 22).

On January 20, 2014, just one week before the due date of the briefs of the Intervenors and the United States, the University filed a motion for a limited remand or, in the alternative, to dismiss, asking that the case be sent back down to the district court to allow it to supplement the record with additional facts. Univ. Mot. for Limited Remand (Doc. No. 27). The Court has taken that motion under advisement. Order (Doc. No. 32).

SUMMARY OF ARGUMENT

I. The University is unlikely to prevail on its claim that the Accommodation runs afoul of RFRA. To demonstrate a substantial burden, the University must show that the challenged regulations "force[ ] [the University] to do what [its] religion tells [it] not to do." *Korte*, 735 F.3d at 685. The University attempts to meet this requirement by pointing to its exposure to "potentially ruinous fines" for failure to offer a compliant health insurance plan. Univ. Br. at 15; *see also* Compl., AA19 ¶ 67; Univ. Opp. to Mot. to Intervene (Doc. No. 17) at 8. But, as to the University's student health-insurance plan, the government has exerted no coercive pressure whatsoever; the ACA does not require Notre Dame to provide student health insurance at all, leaving the University with an option that would avoid any compromise to its religious beliefs.

As to its employees' health insurance, the University mischaracterizes the choice it faces. The University is not forced to choose between financial ruin and spiritual injury. *Cf.* Univ. Br. at 30. Rather, it must choose between providing health insurance and paying a fraction as much in the form of a tax to offset the cost of publicly subsidizing the employees' health insurance on the public exchange. *See* 26 U.S.C. 4980H(a).

Even if the discontinuation of its health-insurance plans would expose it to a competitive disadvantage in relation to other schools or employers, that would not amount to a substantial burden as a matter of law. *See, e.g.*, *Braunfeld v.*

Brown, 366 U.S. 599, 605-06 (1961) (plurality op.) (upholding law that put religious adherents at competitive disadvantage).

The challenged regulatory scheme would not impose a substantial burden even if the University were somehow unable to discontinue its health-insurance plans. The gravamen of the University's claim is that its submission of the self-certification form "triggers" an objectionable result, Univ. Br. at 8; Compl., AA18 ¶ 65, and that the regulations require it to maintain a relationship with an insurer and third party administrator that are "authorized to provide or procure [ ] objectionable coverage." Univ. Br. at 13. But it is the *government* (not Notre Dame) that "triggers" the result to which the University objects, and the *government* (not Notre Dame) that has "authorized . . . objectionable coverage." RFRA does not empower the University to preclude the government from imposing such obligations on third parties; nor does it authorize the University to stand in the way of the affected women's gaining access to the resulting governmental benefit. *See, e.g.*, *Lyng*, *v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988).

II. Furthermore, even if the University were to demonstrate a substantial burden, the regulations are the least restrictive means of furthering compelling governmental interests. Whatever the government's interest is in ensuring access to contraceptive services generally, it is far greater with respect to students like those attending the University. Addressing the particular vulnerability of young persons of limited means lies at the heart of the concerns underlying the

contraceptive regulations. And the life circumstances, diminished earnings, and diminished planing skills of young people make it essential that they be provided with access to contraceptives in a convenient, one-stop-shopping regime. The regulations employ the least restrictive means of accomplishing that aim.

III. Finally, applying RFRA as urged by the University—so that, by simply raising its hand, the University is entitled to inflict significant third-party harms on its students and employees—cannot be reconciled with the Supreme Court's pre-*Smith* case law, RFRA's legislative history, the canon of constitutional avoidance, or the Establishment Clause.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *See Joseph v. Sasafrasnet, LLC*, 689 F.3d 683, 689 (7th Cir. 2012). Questions of law are reviewed de novo. *See id.*

ARGUMENT

I. The Regulations Do Not Substantially Burden The University's Religious Exercise.

The centerpiece of the University's lawsuit is its claim that the challenged regulations violate RFRA, which forbids the Government to "substantially burden a person's exercise of religion" except by the least restrictive means necessary to accomplish a "compelling governmental interest." 42 U.S.C. § 2000bb-1.[4] Thus, in

[4] Pending the Supreme Court's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114 (10th Cir. 2013), *cert. granted*, 2013 WL 5297798 (U.S. Nov. 26, 2013) (No. 13-354), which will provide guidance on RFRA's application to corporate entities' activities, the

order to make out a RFRA claim, the University must first demonstrate that the challenged regulations substantially burden its religious exercise. *See Korte*, 735 F.3d at 673.[5]

The University has failed to meet this burden for two independent reasons. First, it can discontinue both its student and its employee health-insurance plans with no consequence to its religious exercise, and with only minimal practical consequences that are, as a matter of law, insufficient to establish a substantial burden. Second, as a legal matter, a substantial burden does not exist when a litigant's objection pertains to independent actions of the government or other third parties.

A. Notre Dame faces no substantial burden because it can discontinue its health-insurance policies.

To demonstrate a substantial burden, the University must show that the challenged regulations "force[ ] [the University] to do what [its] religion tells [it] . . . not [to] do." *Korte*, 735 F.3d at 685. That coercion can take the form of a threat of criminal sanction, the imposition of ruinous fines, or other "enormous pressure

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Intervenors wish to preserve the argument that the University is not entitled to advance a RFRA claim. *See* Mot. to Intervene (Doc. No. 12) at 5-6.

[5] The University must also establish that its assertion of a religious belief is sincere. *Korte*, 735 F.3d at 683. The University's flip-flop on its compliance with the Accommodation casts doubt on its sincerity. *See, e.g., Int'l Soc'y. For Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (a claimant's asserted religious belief is "not . . . 'sincere' if he acts in a manner inconsistent with that belief"). Because the United States conceded the issue of sincerity before the district court, *see* Univ. Resp. in Opp. to Univ. Mot. for Prelim. Inj. (Doc. No. 13) at 14, however, the Intervenors do not now assert it as an alternative ground for affirming the decision below. Rather, Intervenors intend to develop the issue on remand.

. . . to violate [one's] religious beliefs." *Id.* at 683. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), it took the form of a criminal penalty that was "not only severe, but inescapable" because it compelled the plaintiffs, under threat of criminal sanction, to perform acts at odds with their religious beliefs. *Id.* at 218. In the unemployment-compensation cases, the Supreme Court found a substantial burden in forcing workers "to choose between their livelihoods and their faith." *Korte*, 735 F.3d at 679. In both of these circumstances, the adherent's "legal and religious obligations [we]re incompatible." *Id.* at 685.

The University claims that the coercion in this case is accomplished by subjecting it to "potentially ruinous fines" for failure to offer a compliant health-insurance plan. Univ. Br. at 15; Compl., AA19 ¶ 67; Univ. Opp. to Mot. to Intervene (Doc. No. 17) at 8. But the University is not required to provide student or employee health insurance. Under the regulatory scheme, it may drop the former without penalty, and the latter by paying a tax amounting to a mere fraction of what it currently spends on health insurance. The University's potential savings (discussed in § I.A.2.b. below), meanwhile, could be used to subsidize students' and employees' purchase of health insurance on the exchange. Being faced with a choice between direct provision of employee benefits and reliance on a system of public subsidization does not, as a matter of law, amount to a substantial burden. The University's legal and religious obligations simply are not incompatible.

1. The University can discontinue its student-health-insurance plan without sacrificing its religious scruples.

In making its substantial-burden argument, the University has largely refrained from differentiating between its employee and student health insurance. *See, e.g.,* Univ. Br. at 1 ("The Government . . . forces the University of Notre Dame to violate its religious beliefs" through health insurance for "its employees and students."); *see also* Compl., AA9-30 ¶¶ 35, 39-42, 45, 67, 71, 96, 126-29 (discussing student insurance as part of the basis of this litigation). By doing so, the University obscures an essential fact: the ACA does not require the University to provide student health insurance. As the University has itself admitted, "[t]he employer-based regulatory scheme of the ACA permits Notre Dame . . . not [to] provide a student health plan" (Univ. Opp to Mot. to Intervene (Doc. No.17) at 4)—a course that other educational institutions already have pursued in light of the new regulatory regime. *See* Louise Radnofsky, *Big Changes in College Health Plans*, Wall St. J., June 4, 2012, http://on.wsj.com/1khPkaa. While naturally the Intervenors do not encourage the University to take this step, the University's ability to do so underscores the crucial legal point: the University is by no means "require[d] . . . to participate in" an objectionable "scheme on pain of substantial financial penalties" as to its student policy. Univ. Rep. Br. in Supp. of Inj. Pending Appeal (Doc. No. 10) at 1. In short, while the University dwells on the choice between suffering religious injury or crippling fines, it has largely ignored a third option—one that would

allow it to comply with the law while facing neither harm. *Cf. Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673, 681 (7th Cir. 2013) (failure to explore alternative sites for building undermines claim of substantial burden under Religious Land Use and Institutionalized Person Act (RLUIPA)).

The University likens its position to the plaintiffs in *Yoder* and *Thomas v. Review Bd. of Ind. Emp't Sec. Div*, 450 U.S. 707 (1981). Univ. Br. at 29. But those cases involved individuals "compelled to choose between their livelihoods and their faith," *Korte*, 735 F.3d at 679, or laws that "affirmatively compel[led individuals], under threat of criminal sanction," to violate their religious beliefs, *see Yoder*, 406 U.S. at 218. The University, on the other hand, can comply with the law without violating its religious beliefs or suffering any adverse consequences that render its religious exercise "effectively impracticable." *Korte*, 735 F.3d at 682. To use the University's analogy, it is free to refuse the bank robber a ride. *Cf.* Univ. Br. at 38.

While some employers have claimed that they are religiously required to furnish their employees with health insurance (*see, e.g. Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at *1 (8th Cir. Feb. 1, 2013)), Notre Dame has made no such claim. Nor could it. The University has, in past litigation, represented that the provision of insurance benefits is not "religious exercise." For example, in *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008), an Establishment Clause challenge to public funding of a teacher-training program at Notre Dame, the University argued that benefits like health insurance are

"secular expenses" without religious import. *See Laskowski v. Spellings*, Br. of Def.-Appellee, Univ. of Notre Dame, Def.-Intervenor-Appellee, No. 05-2749, 2005 WL 3739459 (7th Cir.), at 8. Similarly, in another Establishment Clause challenge to Notre Dame's receipt of public funds, the University argued that purchasing health insurance is "administrative" in nature and that such expenses do not constitute "religious instruction or activity." *Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv.*, Br. of Def.-Intervenor in Supp. of Summ. J., 2003 WL 25709328 (D.D.C.), at Part A, § 3, para. 10. In this case, the University has likewise characterized any injury it would suffer by failing to provide insurance as secular in nature. *See* Univ. Br. at 29-30 (mentioning "practical" consequences only).

Rather than claiming a religious opposition to discontinuing its health-insurance plans, the University claimed in its Complaint that dropping its student insurance "would negatively impact Notre Dame's efforts to recruit and retain students." Affleck-Graves Aff., AA56 ¶ 61. But less than a quarter of the University's students, *see* Compl., AA9 ¶ 40, and only 3% of its undergraduates, even rely on the University's health insurance, *See* Manya Brachear Pashman, *3 Notre Dame Students Weigh in on School's Lawsuit Against Health Care Law*, Chicago Tribune, Jan. 8, 2014, http://bit.ly/19Vjv59. It is thus difficult to believe that Notre Dame would suffer grave consequences if it were to discontinue this coverage. *See World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) ("[In] determining whether a burden is substantial[,] . . . substantiality

is a relative term—whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.").

Regardless, whatever competitive disadvantage the University might face would not amount to a substantial burden as a matter of law. A burden is not substantial when it does not subject individuals to criminal prosecution or the loss of their livelihoods, but merely "operates so as to make the practice of their religious beliefs more expensive" or inconvenient. *Braunfeld,* 366 U.S. at 605. Thus, in *Braunfeld*, the Court rejected a challenge by Orthodox Jewish businessmen to a Sunday closing law that they alleged would "compel [them] to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or [would] put [them] at a serious economic disadvantage if they continue to adhere to their Sabbath." *Id.* at 602. Indeed, one of the merchants claimed that the law would render him unable to continue in his business. *Id.* at 601. But because the law gave the merchants the option of remaining closed on both Saturdays and Sundays, any burden imposed by the law was insubstantial. *Id*. at 605. The Court reasoned that it could not completely insulate religious business people from the need ever to weigh their beliefs in their decision-making calculus without "radically restrict[ing] the operating latitude of the legislature." *Id.* at 606; *see also Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392 (1990) (no "constitutionally significant burden" on religion where tax does not "effectively choke off an adherent's religious practices"); *Bob Jones Univ. v.*

United States, 461 U.S. 574, 603-04 (1983) (no substantial burden when challenged scheme "will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets").

Furthermore, if dropping health insurance would, indeed, harm the University's students or put the University at a competitive disadvantage (*see* Univ. Mot. for Limited Remand (Doc. No. 27) at 7), nothing would preclude the University from furnishing its students with vouchers or stipends that could be used to defray the costs of purchasing health insurance on the exchange. There are certainly existing legal mechanisms for doing so. *See, e.g.,* Christina Merhar, *FAQ - Can I Offer a Health Insurance Stipend to Employees?*, Employee Health Bens. and Insur. Blog (Oct. 21, 2013, 2 p.m.) http://bit.ly/1dSaJph. There is no reason that RFRA should spare the University's having to make a choice confronting all similarly situated colleges, simply because religion is part of its business calculus.

2. The University faces no coercion to provide its employees with health insurance.

If the Court decides that the challenged regulations must stand or fall as to student and employee insurance alike, the availability of an alternative likewise extends to the University's employee plan. Even here, the University is not "require[d]. . . to participate in" an objectionable "scheme on pain of substantial financial penalties." Univ. Rep. in Sup. of Mot. for Inj. Pending Appeal (Doc. No.

10) at 1. Rather, it is given a choice: it may provide the insurance itself, or it may pay a tax to offset the cost of publicly subsidizing its employees' health insurance—a tax that happens to be far lower than the cost of providing the insurance directly. Being put to that choice—one faced by countless other colleges and businesses around the country—hardly amounts to the imposition of a substantial burden.

a. What the University calls a fine is actually a tax.

The University claims that the challenged regulations force it to violate its religious beliefs on pain of "potentially ruinous fines." Univ. Br. at 15. But the University's financial liability is not "ruinous"; nor may it be accurately characterized as a "fine." Rather it is a *tax*—a payment into a social-welfare program no different than any such payment required of employers since the New Deal, and no more punitive.

The pertinent part of the new healthcare law is 26 U.S.C. § 4980H—a provision titled "Shared responsibilities for employers." If an employer fails to offer a health-insurance plan, its employees become eligible for public health-insurance subsidies. When an eligible employee applies for subsidized health insurance on the public exchange, this provision triggers the employer's obligation to make "assessable payments" to the IRS amounting to $2,000 per employee (discounting the first thirty employees) per year. *Id.*

The payment is a tax, both in name and substance. First, the statute itself characterizes such payments as a "tax." *See id.* § 4980H(c)(7). Moreover, as the

Fourth Circuit recently observed in *Liberty University, Inc. v. Lew*, assessable payments made under this provision easily qualify as a tax under the "functional approach" of recent Supreme Court jurisprudence. 733 F.3d 72, 96 (4th Cir. 2013) (quoting *NFIB*, 132 S. Ct. at 2595), *cert. denied*, 134 S. Ct. 683 (U.S. 2013). The assessable payments generate governmental revenue, thus presenting the "essential feature" of a tax. *NFIB*, 132 S. Ct. at 2594. Furthermore, the payments lack any requirement of scienter, are collected by the IRS like any other tax, and carry no additional legal consequences for the payer. *Id*. at 2595-97. Once an employer pays its share of the cost of providing this public benefit, it has "fully complied with the law." *Id*. at 2597.

Moreover, the tax is triggered only when necessary to offset the cost of publicly subsidizing health insurance, and the amount is manifestly "proportionate rather than punitive." *Liberty Univ.*, 733 F.3d at 98. Rather than prod employers to provide health insurance—which it does not do, for the tax is far less expensive—this provision defrays the cost of public subsidization. Therefore, as the Fourth Circuit has observed, the law "does not punish unlawful conduct, [but] leaves large employers with a *choice for complying with the law*—provide adequate, affordable health coverage to employees or pay a tax." *Id.* at 98 (emphasis added).[6]

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[6] The Court in *Korte* seemingly did not consider this alternative. In its substantial-burden analysis, the *Korte* Court noted only that the plaintiffs would be forced to "pay $100 per day per employee" should they fail to comply with the regulations, referring to the substantially more severe consequence of offering a plan that omits contraceptive coverage. *Korte*, 735 F.3d at 683; *see also id*. at 663-64. The Court's silence was likely driven by the

b. Paying the tax is by no means crippling, or even onerous.

In its brief, the University states that because the tax may "involve millions of dollars, [it] clearly impose[s] the type of pressure that qualifies as a substantial burden." Univ. Br. at 30. In fact, the tax amounts to less than half the average per-employee cost of employer-based health insurance in Indiana. The Henry J. Kaiser Family Found., *Average Single Premium per Enrolled Employee for Employer-Based Health Insurance*, http://bit.ly/1eVfSK6. The University has approximately 5,200 employees that qualify for health insurance. Compl., AA9 ¶ 38. It spends more than sixty million dollars a year on their healthcare benefits. Ed Cohen, *Pay or Play? Impending Reforms Have Employers Weighing the Costs and Benefits of Health Care Coverage*, Notre Dame Bus. Mag., June 2013, http://bit.ly/1kEECgv. If the University were to replace the direct provision of health insurance with payment of the tax for publicly subsidized healthcare for its employees, the tax would be paid *instead of* the University's current sixty-million-dollar expenditure, not in addition to it. Accordingly, paying the $2,000-per-employee tax could very well result in savings of nearly *fifty million dollars* per year. It is therefore hard to understand how the tax is remotely "crippling." Univ. Br. at 17.

United States' having not raised this issue, presumably because encouraging employers to pursue that course is incompatible with the government's larger policy goals. *See* Mot. to Intervene (Doc. No. 12) at 6.

Indeed, one of the University's own publications, the Notre Dame Business Magazine, recently featured an article recognizing Notre Dame's latitude as to its employee health insurance. The article sported the following kicker: "Reforms set to take effect Jan. 1 give employers hard numbers to use in weighing the costs and benefits of continuing to provide health coverage. Which will you choose?" Cohen, *supra*. The article assumes throughout that simply paying the tax is a rational business decision on par with providing health insurance directly, noting that the tax is "actually far less than the cost of typical health plans." *Id*. The article cites the University's Director of Benefits and Wellness as explaining that "Notre Dame's leadership decided to continue to offer coverage at the current time and will continue to monitor the impact of future changes." *Id*.

In its brief, the University refers to "ruinous practical consequences" that would arise if it were unable to offer healthcare benefits. Univ. Br. at 29-30. But the cited affidavit offers scant support for the point. *Id*. (citing AA55-56 ¶¶ 56, 59-61). The University filed a motion for a limited remand to allow it to return to the district court and shore up its evidence on this issue (*see* Univ. Mot. to Remand (Doc. No. 27)), essentially admitting that it failed to demonstrate the underlying facts to support the assertion. That failing, however, need not carry the day because even if Notre Dame were to demonstrate that severe "practical consequences" would result as a matter of fact (Univ. Br. at 29), under *Braunfeld*, 366 U.S. at 605-06, and other cases, that would not amount to a substantial burden as a matter of law. *See supra* § I.A.1.

Nor would the University have a RFRA right to object to the payment of the $2,000 tax, as the Supreme Court has repeatedly rejected such challenges to general taxation schemes. *See, e.g., United States v. Lee*, 455 U.S. 252, 257 (1982); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *Jimmy Swaggart Ministries,* 493 U.S. at 391.

The ACA puts all large employers—religious and secular alike—to a choice between providing minimally compliant plans or assuming "[s]hared responsibility" under the statute. 26 U.S.C. §4980H. Employers can drop their plans for any number of reasons—whether to honor their faith, provide their employees with a wider range of coverage choices, reduce their economic burden, or cut down on paperwork. That choice is no less viable for Notre Dame than for any other employer.

B. The Regulations Impose Obligations on Independent Third Parties, Not Burdens on Notre Dame.

Even if the University lacked the ability to discontinue its health-insurance plans, there would still be no substantial burden on its religious exercise. It is not enough for Notre Dame to state—even repeatedly—that a Court cannot evaluate its assertions that completing the self-certification form, and that maintaining an ongoing relationship with its insurer and third party administrator, run afoul of its religion. *See* Univ. Br. at 17 (Notre Dame's assertions "should end the inquiry"); *accord id.* at 18, 19, 20, 22, 23, 24, 31, 32, 33, 38. As this Court has held, a litigant's "say-so is not enough" to demonstrate a substantial burden.

Gelford v. Frank, 310 F. App'x 887, 889 (7th Cir. 2008) (quotation marks omitted); *accord Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006) ("unreasoned say-so . . . is insufficient").

Lest the entire federal code submit to strict scrutiny, courts must independently assess whether a plaintiff's articulated religious injury—even if sincerely held and deeply felt—is "substantial" as a matter of law. While RFRA's first draft prohibited the government from imposing any burden whatsoever, Congress added the adverb "substantially" to make clear that RFRA "does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). Congress reiterated that RFRA "would not require [a compelling governmental interest] for every government action that may have some incidental effect on religious institutions." S. Rep. No. 103-111, at 9 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898. Not every RFRA claim will prevail, "just as not every claim prevailed prior to the *Smith* decision." 139 Cong. Rec. S26178 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy).

The courts have followed Congress's lead. As this Court explained in the parallel context of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, the word "substantial" cannot be rendered "meaningless"; otherwise, strict scrutiny would arise from "the slightest obstacle to religious exercise"—"however minor the burden it were to impose." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). Accordingly,

even if a plaintiff's beliefs "are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996). "Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from . . . restrictions of any kind." *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

That is not to say that the Court can reject Notre Dame's assertion of a burden on the view that the University's religious views are irrational or outlandish, *see Thomas*, 450 U.S. at 714, or on the ground that its objection is not central to its religious exercise, 42 U.S.C. § 2000cc-5(7)(A), but it *is* to say that the court not only can, but must, make a judgment, relying on secular principles of law, about whether Notre Dame is itself burdened by the challenged regulations or if, instead, it seeks to tie the hands of independent third parties.

In *Lyng*, a group of Native Americans claimed that the disruption that would be caused by a governmental forestry project would "virtually destroy the . . . Indians' ability to practice their religion." 485 U.S. at 451. The Court nonetheless rejected the plaintiffs' claim, reasoning that a burden on religious practice is necessarily "incidental" when it arises from independent governmental action that does not itself coerce affected individuals into violating their religious beliefs. *Id.* at 449-50. Similarly, in *Bowen v. Roy*, 476 U.S. 693, 700 (1986), the plaintiffs contended that their religious beliefs prevented them from acceding to

the government's use of a social-security number for their daughter in administering welfare programs. The Court rejected the challenge, reasoning that "[t]he Free Exercise Clause . . . does not afford an individual a right to dictate the conduct" of others. *Id.* at 700.

Kaemmerling v. Lappin, 553 F.3d 669, 677 (D.C. Cir. 2008), relied on *Bowen* to reject a prisoner's RFRA challenge to the government's collection and analysis of his DNA. While the court accepted the "sincere and. . . religious nature" of the prisoner's objection to DNA analysis, it reasoned that "[t]he extraction and storage of DNA information are entirely activities of the [government]." *Id.* at 679. Thus, although the "government's activities. . . offend[ed his] religious beliefs," *id.*, the government did not "pressure [him] to modify his behavior" so as to substantially burden his religious exercise, *id.* (quoting *Thomas*, 450 U.S. at 718) (brackets in original).

Judge Simon correctly concluded, on the basis of these and other cases (*see* Dist. Ct. Op., SA16-17), that Notre Dame's religious exercise is not burdened by a regulatory scheme that requires it to do nothing beyond what it has always done—namely, to ask its insurer and third-party administrator *not* to provide beneficiaries with contraceptive coverage. *Id.* at SA14-15.

Notre Dame claims that the *impact* of its objection makes all the difference. Formerly, according to the University, its assertion of an objection had the effect of making the coverage unavailable, whereas now, the objection triggers an obligation on the part of the insurer or third party administrator to reach out to

beneficiaries to make contraceptive coverage available. Univ. Br. at 34. In the University's view, "[t]he Government has effectively made 'no' mean 'yes,' transforming the very act of objecting to the mandated coverage into the authorization to provide such coverage." *Id.* But Notre Dame is not providing "the authorization to provide such coverage"; the federal government is. The obligation on Notre Dame's insurer and third party administrator to provide the contraceptive coverage stems not from Notre Dame, or from submission of the form, but from the ACA.

It is the University, not the government, that has made "'no' mean 'yes'" (*cf. id.*) when it claims that the government has coerced it to engage in the *facilitation* of contraceptive coverage by asking it to fill out a form that specifies its *opposition* to such coverage. *See id.* at 31. Under that view, a judge who recuses himself from a death-penalty case could claim that he has a RFRA right to refuse to recuse in writing because that would facilitate the assignment of a new judge to hear the case. A wartime conscientious objector could claim an exemption from appearing at the draft office to put his objection in writing because that act would pave the way for someone else to be assigned in his place. But those claims—like this one—should fail, because the authorization for a new judge's assignment, for another soldier to be drafted, and for contraceptives to be covered, arises from the government's judgment that it should be so, not from the conscientious objector's submission of the form. *Cf. Ghashiyah v. Litscher*, 278 F.

App'x 654, 658 (7th Cir. 2008) (prisoner's claim that "requirement that he fill out a form" substantially burdened his religious exercise was "frivolous").

Even if the University views contraceptive use as the moral equivalent of robbery, the University is not being asked to carpool with a bank-robber; after the University declines, the Government swings by to give him a lift. *Cf.* Univ. Br. at 38. Likewise, Notre Dame never hands a knife to any neighbor, whether murderous or not; when the University refuses the blade, Congress delivers the weapon to the neighbor itself. *Cf. id.* at 39.

So Notre Dame goes on to argue that the actions to which it objects extend beyond the submission of the self-certification form to being required to maintain an ongoing relationship with an insurer or third party administrator that "is authorized to provide the objectionable coverage." *Id.* at 27. The University's repeated use of the passive voice (*see id.* (using the term "is authorized" in every action to which it objects)) illustrates the flaw in its argument: again, the authorization is being provided by the government, not by Notre Dame. And the University has no more right to interfere with that authorization process than it does to stand in the way of its students and employees' access to the resulting governmental benefit.

II. The Regulations Employ the Least Restrictive Means of Advancing Compelling Interests.

The regulatory scheme serves the compelling interests of reducing unwanted pregnancies and abortions in young people, allowing women to obtain

access to a regulatory benefit that is essential to their wellbeing, and addressing gender disparities in health-care costs. And it does so via the least restrictive means necessary to accomplish those ends: it provides women with access to insurance plans that lack cost and convenience-related barriers to contraception, but it does so while allowing objecting employers to opt out of providing the coverage themselves.

The University claims that "*Korte* forecloses any argument that the Mandate can survive" the compelling-interest test. Univ. Br. at 17. But the *Korte* Court found only that the government's arguments regarding compelling interest were vague and unresponsive, and that the government "ha[d] not even tried to satisfy the least-restrictive-means component of strict scrutiny." 735 F.3d at 686-87. And *Korte* involved the employees of for-profit corporations; it did not involve students, who have an especially dire need for seamless access to contraceptives. *See infra* §§ II.A. & B. *Korte* also involved a challenge to the direct subsidization of contraception, for which the regulatory regime has a greater number of exceptions. *See infra* § II.C. Indeed, as discussed below on page 39, the plaintiffs in *Grote* cited the Accommodation at issue in this case as an exemplar of the less restrictive alternatives that the government could have employed.

A. The regulations serve the compelling interests of reducing students' pregnancies, facilitating students' access to an essential benefit, and ensuring gender equity.

The Supreme Court has held that RFRA's compelling-interest test focuses on the "asserted harm of granting specific exemptions to particular religious

claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *see also Korte*, 735 F.3d at 686 (compelling interest cannot be evaluated at a "high level of generality"). Here, there are specific and compelling interests in applying the challenged regulations to the University: reducing unwanted pregnancies and resulting abortions among the University's students, providing students with access to a benefit essential to their wellbeing, and ensuring that female students do not face substantially higher costs than male students in meeting their healthcare needs.

Whatever the government's interest in ensuring access to contraceptives generally, it applies with special force to a college-age population, which represents the demographic most vulnerable to the harms the regulations seek to prevent. *See* IOM Rep. at 102. The University's student population includes over 5,000 young women, most of them undergraduates aged 18 to 22. *See* Univ. of Notre Dame, *At A Glance*, http://bit.ly/1e2iDY0. This demographic is highly sexually active, with 80% of college students having had sex, 62% of them within the last three months. M. Lynn Cooper, *Alcohol Use and Risky Sexual Behavior among College Students and Youth: Evaluating the Evidence*, 14 J. of Stud. on Alcohol (Supplement No. 14) 101, 104 (2002), http://1.usa.gov/1n8toQ9; Sycamore Trust, *Moral Theology 000*, Sept. 5, 2013, http://bit.ly/Lr74lS ("It is a commonplace that there is a good deal of alcohol abuse and illicit sex at Notre Dame.").

It thus comes as no surprise that this demographic also has the highest rate of unintended pregnancy. *See* Lawrence B. Finer and Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001-2008*, 104(S1) Am. J. of Pub. Health S43, S44-45 (2014), http://bit.ly/1dEgz7K. Overall, 15% of college students report either experiencing or causing another's pregnancy. Cooper, *supra*, at 102. A number of factors may play a role in these rates. The prevalence of drinking on college campuses has been linked with risky sexual behavior. *See id.*; *see also* Sycamore Trust, *Moral Theology 000*, September 5, 2013, http://bit.ly/Lr74lS ("Twenty percent of [Notre Dame] students [are] regular, and another 60% occasional, abusers [of alcohol]."). Current norms may also share some responsibility. *See id.* (noting that students tend to become more accepting of premarital sex in college, with the number of such students increasing by 71% in a given class over four years). While the reasons for the high rate of unintended pregnancy among young adults may be indeterminate, it is undeniably the case that women in college—including those at the University—are particularly at risk.

Not coincidentally, women aged 18-24 account for nearly half of all abortions in the United States. *See* Guttmacher Inst., *Facts on Induced Abortion in the United States* (Dec. 2013) http://bit.ly/1bZJLuQ. If one includes women in their mid-to-late twenties, the demographic accounts for just over two-thirds of all domestic abortions, which works out to roughly 822,800 abortions in 2008 alone. *See id.*

If a student elects to carry an unwanted pregnancy to term, the consequences are no less dire, for both mother and fetus. If the child is carried to term, it is far more likely to be born prematurely and/or at a low birth weight than an intentionally conceived child. IOM Rep. at 103. And women who have children early in life suffer negative education and career-related consequences, and are far less likely to complete their college education. *See* Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Short-Term Enrollment in Postsecondary Education: Student Background and Institutional Differences in Reasons for Early Departure, 1996–98*, NCES 2003–153 (2002), http://1.usa.gov/L3KHT6. In turn, the failure to complete one's college education has disastrous consequences on former students' lives. For example, those who drop out of college fare little better than high-school dropouts on the job market, with an unemployment rate almost twice that of bachelor's-degree holders. *See* Bureau of Labor Stat., *Earnings and Unemployment Rates by Educational Attainment* (2012), http://1.usa.gov/19WNJ5H. Even employed college dropouts earn on average 32% less than their degree-holding contemporaries. *Id*.

Female students' interests in gender equity are likewise pronounced. Students, generally speaking, lack full-time employment. Students at the University receiving financial aid in the form of on-campus work make between $1,275 and $1,713 during a 17-week-long term. *See* Univ. of Notre Dame, *2013-2014 Undergraduate Admissions Fact Sheet*, http://bit.ly/1jGEQ2W. Those without access to financial aid are likely dependent on their parents, with whom

they may not wish to negotiate about their need for contraception. The disproportionately high cost of preventive services for women (*see* p. 4 above) thus falls especially hard on students.

It almost goes without saying that addressing these circumstances is a compelling governmental interest. "Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). The government's interest in public health likewise has been recognized as one of paramount importance for over a century. *See Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944)*; Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *see also Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C.), *aff'd sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012) (government's interest in the health of its citizens as expressed in the ACA is a compelling interest under RFRA); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995) (law forbidding protestors to block abortion clinics serves compelling interest because it "protects public health by promoting unobstructed access to reproductive health facilities"). Surely the government's interest in reducing unintended pregnancies and abortions, and in providing women with the means of ensuring their health and wellbeing, is at least as compelling as, for example, that of its interest in the health and wellbeing of birds. *Cf. United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) (finding a compelling interest in protecting bald and golden eagles under RFRA).

B. The challenged regulations employ the least restrictive means of addressing the interests that they serve.

A recurring theme throughout the IOM report is that, when it comes to contraception, there can be no half measures in terms of cost and convenience. *See* IOM Rep. at 102-110. Particularly for young people, making contraceptives even marginally more expensive or less accessible would dramatically undercut the goals of the regulations. Accordingly, requiring that all student health-insurance plans include such coverage on a one-stop-shopping basis, and without cost-sharing, is essential to ensuring that such plans are actually able to vindicate the compelling governmental interests at issue.

Myriad social-science studies demonstrate that even exceedingly low barriers—whether they take the form of cost or inconvenience—can deter people from accessing benefits and services. As Cass Sunstein, law professor and former Administrator of the White House Office of Information and Regulatory Affairs, notes, "people may decline to change from the status quo even if the costs of change are low and the benefits substantial. . . . It follows that complexity can have serious adverse effects, by increasing the power of inertia, and that ease and simplification (including reduction of paperwork burdens) can produce significant benefits." Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation*, Oxford Handbook of Behav. Econ. & the Law (forthcoming), February 16, 2013, http://ssrn.com/abstract=2220022.

Study after study confirms this dynamic. For example, removing a cost barrier—even one that is exceedingly minor—has been shown to dramatically increase consumption. *See* Kristina Shampan'er & Dan Ariely, *Zero as a Special Price: The True Value of Free Products*, http://bit.ly/1iy2eSp. When Amazon.com inadvertently imposed a ten-cent shipping price for goods sent to one European country, while dropping the shipping price to zero for other countries, it watched sales soar in the latter context and remain static in the former. *Id* at 40.

Increased costs above the "magic of zero" is by no means the only kind of barrier that will deter use. Placing a plate of food just inches further away from someone—requiring them to extend their arm to obtain access—can lead to as much as a 16% decrease in consumption. Paul Rozin et al. *Nudge to Obesity I: Minor Changes in Accessibility Decrease Food Intake*, 6(4) Judgment & Decision Making 323 (2011). One study found that if employees are faced with a default rule in which they automatically contribute 3% of their income to a 401k plan, virtually no employees opt out; but a majority of employees will fail to make any contributions in the absence of an enrollment-by-default rule. Briggite C. Madrian, et al., *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Quarterly J. of Econ. 1149 (2001), http://bit.ly/L3y36J.

Studies show that women's use of contraception reflects the same phenomena. One study showed that when condom prices rise from 0 to a mere 25 cents, sales decline by a whopping 98%. Deborah Cohen, et. al., *Cost as a Barrier to Condom Use: The Evidence for Condom Subsidies in the United States*, 89(4)

Am. J. of Pub. Health 567 (1999), http://1.usa.gov/1b1Q1gV. The same result holds when the barrier takes the form of inconvenience rather than cost. For example, in another study, making oral contraceptives only slightly less convenient—dispensing them at a rate of 3 months rather than providing an annual supply—resulted in a 30% greater chance of unintended pregnancy, and a 46% greater chance of obtaining an abortion. Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117(3) Obstetrics & Gynecology 566 (2011), http://bit.ly/1ebyZRQ.

The results are greatest when both cost and convenience-related barriers are removed. Researchers at Washington University in St. Louis found that making the most convenient forms of contraception—those requiring the least effort to maintain—available at no cost to young women resulted in a staggering 80% drop in the rate of unintended pregnancy, leading them to predict that the regulations before the Court could "prevent[ ] as many as 41-71% of abortions performed annually in the United States." Sarah Kliff, *Free Contraceptives Reduce Abortions, Unintended Pregnancies. Full Stop.*, Wash. Post, Oct. 5, 2012, http://wapo.st/1ideMhQ.

The need for cost-free and convenient access to contraceptives is especially pronounced with students, who lack well-developed planning skills because of their young age, and who lack ready access to earnings and transportation. Neurologically, persons as young as the University's undergraduates are simply less adept at planning ahead. *See* Sara B. Johnson, et. al., *Adolescent Maturity*

and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45(3) J. Adolesc. Health 216 (2009). Students' pervasive use of alcohol further impairs their judgment and increases their resort to risky sexual behavior. *See* Cooper, *supra*. Their lack of access to easy transport (*see* Univ. of Notre Dame, *Office of Housing FAQs*, http://bit.ly/1mNileW (indicating that first-year students are forbidden to possess a car on campus))—together with their diminished earnings—further decrease the likelihood that they will take special measures to obtain contraception independently from their broader health-insurance plan.

Accordingly, the least restrictive means of accomplishing the government's interests in cutting down students' unwanted pregnancies and abortions, in facilitating students' access to an essential benefit, and in ensuring gender equity, is to provide students with access to contraceptives as seamlessly and cheaply as possible. That is precisely how the Accommodation is structured: it ensures that contraceptive coverage is integrated into women's broader health-insurance plans, while allowing objecting employers to opt out of providing the coverage themselves. Indeed, the plaintiffs in *Grote* cited the Accommodation at issue in this case as an exemplar of the less restrictive alternatives that the government could have extended to for-profit corporations. *Grote v. Sebelius*, Pls.' Br., 2013 WL 816519, at 36 n.13; *Grote v. Sebelius*, Pls.' Rep. Br. 2013 WL 1451375, at 18.

In contrast to the Accommodation, every one of the alternatives suggested by the University, *see* Univ. Br. at 40 (citing Univ. Mem. in Supp. of Prelim. Inj.,

(Doc. 18) at 34-35), entail additional cost, considerably greater inconvenience, or both—thereby compromising the very purpose of the regulations. The University suggests that the government could directly provide contraceptive services, take steps to have those services provided by entities that already do so, or issue tax credits or deductions to women who purchase contraception (*see* Univ. Mem. in Supp. of Prelim. Inj., (Doc. 18) at 34)—but all three of those approaches would balkanize students' access to contraception, requiring them to take special measures to gain access to benefits.

The only other alternative the University proposed below was that the government provide coverage for "methods of family planning consistent with Catholic beliefs," such as natural family planning training. *Id.* at 34-35. But natural family planning has been found to be far less effective than contraception, *see* Guttmacher Inst., *Contraceptive Use in the United States*, http://bit.ly/1eZAoJi. Even most sexually active Catholic women appear to recognize this, with at least 98% who have had sex having used a contraceptive method prohibited by the Vatican. *See* Guttmacher Inst., *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use* 4 (April 2011),http://bit.ly/1btjNeq. That approach would likewise fail to account for students' diminished planning skills—relying as it does on fertility awareness and impulse control. And it would have exposed the government to accusations of being intrusive and religiously biased. The government thus understandably

concluded that addressing the problem via a natural-family-planning approach would compromise its goals.

The fit between the means adopted and the ends to be achieved by the government is sufficiently close to satisfy RFRA's compelling-interest test. The government is not "require[d] . . . to prove a negative—that no matter how long one were to sit and think about the question, one could never come up with an alternative regulation that adequately serves the compelling interest while imposing a lesser burden on religion." *Wilgus*, 638 F.3d at 1288. "[S]uch a draconian construction of [the] least restrictive means test would render federal judges the primary arbiters of what constitutes the best solution to every religious accommodation problem . . . [and] would be inconsistent with congressional intent." *Fowler v. Crawford*, 534 F.3d 931, 941 (8th Cir. 2008) (internal quotations omitted) (discussing RLUIPA). "Not requiring the government to do the impossible—refute each and every conceivable alternative regulation scheme—ensures that scrutiny of federal laws under RFRA is not 'strict in theory, but fatal in fact.'" *Wilgus*, 638 F.3d at 1289 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring)).

C. The Accommodation is not under-inclusive.

The *Korte* Court found that the legal obligations at issue there—which require for-profit corporations to include contraceptive coverage in their health-insurance plans—are subject to many exceptions, thereby undermining the government's claim of a compelling interest furthered by the least restrictive

means. 735 F.3d at 686. The Court noted four such exceptions: (1) employers with fewer than fifty employees need not provide health insurance at all;[7] (2) employers are transitionally grandfathered from meeting the ACA's minimum coverage requirements, including the one pertaining to contraceptives; (3) religiously affiliated nonprofits are allowed to avail themselves of the Accommodation at issue in this case; and (4) houses of worship are exempted from both the requirement of including contraceptive coverage and from the Accommodation. *Id*.

Here, in contrast, it is the Accommodation that has been challenged; Notre Dame is not required to include contraceptive coverage in its health plan. Rather, under the Accommodation, Notre Dame opts out of providing coverage and another entity steps in to assume the task, thereby ensuring that women have seamless, integrated access to contraceptives. That requirement—that contraception be coupled with an individual's broader health-insurance plan—is subject to only two exceptions, namely houses of worship and grandfathered plans, neither of which cast doubt on the importance of the government's larger agenda.

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[7] Small employers are not properly understood to be exempted from the contraceptive-coverage requirement, which applies to all group plans without regard to the size of the employer. *See* 42 U.S.C. 300gg-13. Small employers are exempt from a different provision, namely, the one that requires employers to pay a tax if they fail to provide a health plan. *See* 26 U.S.C. 4980H(c)(2)(A). Accordingly, while small employers can decline to provide a plan without paying a tax, any plan they do provide must include contraceptive coverage. So the scheme contemplates that small-business employees will have a comprehensive plan, either through an employer plan or one that they purchase on the exchange.

As to the religious exemption for churches, the Religion Clauses of the First Amendment give special solicitude to the rights of houses of worship. *See, e.g., Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 724 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). The government concluded that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and their employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. The same cannot be said of an institution like Notre Dame, which has a diverse staff, faculty, and student body comprising thousands of people. As the University has itself admitted, the exception for houses of worship is exceedingly narrow. *See* Compl., AA3-27 ¶ 3 (religious exemption reaches only "a small class of religious entities"); ¶¶ 5, 55, 56, 103 (characterizing religious-employer exemption as "narrow"). Such a narrow exception does not demonstrate the insubstantiality of a governmental interest. *See Korte*, 735 F.3d at 686 n.20 (distinguishing the narrow exception in *Lee*).

The only other insurance plans that need not be comprehensive are those that are "grandfathered." But those plans can hardly be characterized as an "exception" to the rule. The government included the "grandfathering rule" in order "to ease the transition of the healthcare industry into the reforms

established by the ACA by allowing for gradual implementation of reforms." Internal Revenue Bulletin: 2010-29, Jul7 19, 2010, http://1.usa.gov/1jqAejD. The rule is a transitional measure, enacted not to exempt any particular category of employers, but to ease employers into coverage without destabilizing the healthcare industry. This category will dwindle to zero fairly rapidly, as older healthcare plans are updated and renewed. *Korte*, 735 F.3d at 661. Indeed, the percentage of employees in grandfathered plans has already dropped from 56% in 2011, to 48% in 2012, to 36% in 2013. The Henry J. Kaiser Family Found., *Employer Health Benefits 2013 Annual Survey* 7, 196, http://bit.ly/1mPe08d. There is no basis in law or logic to say that the government's interest in a massive, sweeping reform is only compelling if that reform is implemented in one fell swoop.

More fundamentally, the fact that a statute has exceptions meant to accommodate countervailing concerns cannot, by itself, demonstrate that the statute serves no compelling interests. For example, in *Gillette v. United States*, 401 U.S. 437, 455 (1971), the Court found that the Government's interest in the draft need not yield to a conscript's religious objection to a particular war. The existence of exceptions for, *inter alia*, students, persons over 26, persons engaged in agriculture, and for ministers and divinity students, *see* Anne Yoder, *Military Classifications for Draftees* (2011), http://bit.ly/1fjHCs0, did not entitle the plaintiff to an exemption, any more than did the existing exception for persons with religious objections to all wars. *Gillette*, 401 U.S. at 455.

Similarly, the uniformity of the tax system is considered a paradigmatic compelling interest. *See, e.g., Hernandez*, 490 U.S. at 699-700, ("[A] substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.') (quoting *Lee*, 455 U.S. at 260). Yet one would be hard pressed to find a scheme more riddled with "deductions and exemptions." *Hernandez*, 490 U.S. at 700.

O Centro is not to the contrary. In *O Centro*, the Court found that the reasons given by the government for denying the exception at issue in that case applied "in equal measure" to another already granted. 546 U.S. at 433. The lesson of that case is not that any exception undermines the general rule. Rather, it is that if the government grants one exception, it must have a principled reason for denying another. Here, as discussed above, the exceptions to the Accommodation are principled and eminently distinguishable from the one sought by the University.

In sum, the government legitimately concluded that the staggering number of unintended pregnancies and abortions among young people was in dire need of attention; that addressing the problem required the provision of one-stop-shopping access to contraceptive coverage; and that countervailing considerations necessitated minor and short-lived exceptions to that requirement. The government is thus likely to sustain its burden of showing that it has achieved a compelling interest using the least restrictive means.

III. The Law Does Not Compel, and Indeed Forbids, the Relief that the University Seeks Because the Requested Exemption Would Impose Harms on Nonbeneficiaries.

A. Neither pre-*Smith* law nor RFRA's legislative history supports recognition of exemptions that come at the expense of others.

"Any religious freedom right that's solely grounded in the religious motivation for one's actions simply can't extend to actions that impair others' rights or impose improper externalities on others." Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1511 (1999)). Thus, the Supreme Court's free-exercise cases evince a "judicial duty to balance harms [that] results in part from concern about third-party harm caused by religious exercise." Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 Minn. L. Rev. 589, 637 (2000).

In *Lee*, 455 U.S. at 253, the Court rejected an Amish employer's request for a religious exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." And in *Braunfeld*, 366 U.S. at 608-09, the Court refused to recognize an exemption to the Sunday closing law because that would have "provide[d] [the plaintiffs] with an economic advantage over their competitors who must remain closed on that day." *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80 (1977) (Title VII's reasonable-accommodation requirement does not entitle employee to exemption that would burden other employees). In contrast, in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), the Court recognized a right to unemployment benefits

that did not "serve to abridge any other person's religious liberties"; and the Court granted the exemption in *Yoder*, 406 U.S. at 235-36, only after the Amish parents had demonstrated the "adequacy of their alternative mode of continuing informal vocational education."

RFRA incorporated this jurisprudence by reference. *O Centro,* 546 U.S. at 424. Consequently, when debating RFRA, Congress did not contemplate a single accommodation that would have imposed substantial costs or burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (citing as examples of contemplated accommodations ensuring burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it" and precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations include allowing parents to home school their children and allowing individuals to volunteer at nursing homes). None of those accommodations would have required third parties to forfeit federal protections or benefits to which they were otherwise entitled.

Indeed, the Court has approved religious exemptions that harm third parties only when designed to preserve religious associational values and "prevent[ ] potentially serious encroachments on protected religious freedoms." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.). Thus, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Court found that the Establishment Clause

permitted, and in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012), that the Free Exercise Clause required, non-interference with the selection of a religious community's membership.

This case does not involve Notre Dame's control over membership within its religious community; it involves the University's ability to deny that community access to generally available public benefits—benefits that were deemed, after extensive study, to be "necessary for women's health and well-being." IOM Rep. at 2. Indeed, for women like the Intervenors, who cannot afford contraceptives otherwise, the regulations provide a lifeline to greater security in their bodies and futures—personal autonomy interests that lie "[a]t the heart of liberty." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). And the imposition on these women is not only to deprive them of access to contraceptive coverage, but to preclude them from independently contracting with a third party to obtain it. In that sense, the harm that is caused by exempting Notre Dame from the Accommodation is greater than the harm caused by exempting for-profit corporations from the Mandate that was challenged in *Korte*.

B. Granting the exemption that the University seeks would apply RFRA in a way that runs afoul of the Establishment Clause.

RFRA and the Free Exercise Clause are not the only means through which the law mediates between religious and secular interests; the Establishment Clause imposes independent limitations on the recognition of religious

exemptions. While there is a core of religious expression that must be accommodated due to the countervailing imperative of the Free Exercise Clause, *see, e.g., Hosanna-Tabor*, 132 S. Ct. 694, the accommodations mandated by RFRA are not constitutionally required. *See O Centro*, 546 U.S. at 424 (noting that RFRA was enacted to provide more accommodation for religious activity than the Court deemed required by the Free Exercise Clause in *Smith*). The University's RFRA claim is therefore subject to Establishment Clause limitations.

Privileging the University's religious interest in an indirect association with contraceptive coverage over the interests of literally thousands of women in actually receiving that benefit—and giving the University veto power over the flow of such benefits from independent third parties to affected women—would, as applied in this case, place RFRA at odds with the Establishment Clause. Pursuant to its obligation to interpret the statute to avoid constitutional improprieties, Notre Dame's proffered interpretation of the statute should be rejected. *See*, *e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–82 (2005) (discussing the canon of constitutional avoidance).

1. Notre Dame's proposed interpretation of RFRA would violate the Establishment Clause prohibition against exemptions that impose harms on others.

The Supreme Court has held, on more than one occasion, that the Establishment Clause precludes the award of religious exemptions that override other significant interests. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1984), the Court struck down a statute that granted employees a right not to

work on the Sabbath day of their choosing. The Court reasoned that, under the statute, "religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. That is, the statute impermissibly bestowed the "right to insist that in pursuit of [one's] own interests others must conform their conduct to [one's] own religious necessities." *Id.* at 710 (quoting *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Similarly, in *Texas Monthly*, 489 U.S. at 18 n.8, the Court struck down a sales-tax exemption limited to religious periodicals in part because "it burden[ed] nonbeneficiaries by increasing their tax bills."

More recently, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court upheld RLUIPA—a statute that, like RFRA, requires courts to apply strict scrutiny to laws that burden religious exercise—against an Establishment Clause attack. A unanimous Court relied on *Caldor* to hold that in applying RLUIPA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720. In order to comply with the Establishment Clause, the Court explained, any accommodation "must be measured so that it does not override other significant interests." *Id.* at 722.

Under the interpretation of RFRA urged by the University, a religious entity can impose harms on innocent third parties in order to spare itself "practical consequences." Univ. Mot. to Remand (Doc. No. 27) at 6-7. Its assertion of a religious objection must be accepted as gospel. *See*, *e.g.*, Univ. Br. at 17-24,

31-33, 38. Whether it is the kind of organization entitled to an exemption is likewise beyond inquiry. *See id.* at 49-52. Once established, this anemic substantial burden will carry the day if a litigant can contrive any hypothetical, less restrictive solution—even one that is politically infeasible, administratively cumbersome, or considerably less effective. Univ. Mem. in Sup. of Prelim. Inj. (Doc. No. 18) at 34-35. Short of employing an extraordinarily unimaginative lawyer, it's not clear how a claimant can possibly lose under this the analysis. In effect, under the University's view, it should be allowed, simply by raising its hand, to deprive women of access to a governmental benefit that is essential to their wellbeing. The calculus that the University proffers cannot be squared with the Establishment Clause.

2. The University's interpretation of RFRA would grant it an unconstitutional veto over the regulatory obligations of third parties.

The relief that the University seeks is not an exemption, as that term is normally understood; it is more accurately described as a veto. As Judge Simon explained, "the only thing that changes under the healthcare law is the actions of third parties." Dist. Ct. Op., SA1-2. Accordingly, the essence of Notre Dame's claim is that, pursuant to RFRA, it is entitled by virtue of its religious beliefs to interfere with the regulatory obligations of third parties. But "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 734 (1994)

(quoting *Larkin v. Grendel's Den, Inc*, 459 U.S. 116, 127 (1982)). The University's formulation of RFRA—under which it is empowered to direct and curtail the flow of federal regulatory benefits from the government to third parties—violates this principle and so would violate the Establishment Clause.

As the court below put it, once Notre Dame notes its religious objection to providing contraceptive coverage, "[its] work is done." Dist. Ct. Op., SA6. The litany of post-certification "actions necessary to maintain its health plans in compliance with the accommodation" cited by the University, Univ. Br. at 27, amount to nothing more than routine maintenance of the University's relationship with its insurer. After certification, it falls to the insurance company to provide contraceptive services, then to the government to adjust the insurer's health-insurance exchange fee to compensate it for costs so incurred. Dist. Ct. Op., SA6-7. The University's attempt to impede this arrangement "so blurs the demarcation between what RFRA prohibits—that is, governmental pressure to modify one's own behavior in a way that would violate one's own beliefs—and what would be an impermissible effort to require others to conduct their affairs in conformance with plaintiffs' beliefs, that it obscures the distinction entirely." *Roman Catholic Archbishop of Washington v. Sebelius*, __ F. Supp. 2d __,No. 13-1441 (ABJ), 2013 WL 6729515, at *2 (D.D.C. Dec. 20, 2013).

In *Larkin*, 459 U.S. at 125, the Court struck down a law that vested religious organizations with the authority to veto liquor-license applications of nearby establishments. The Court was particularly troubled by the prospect that

this "power ordinarily vested in agencies of government" could be wielded in a manner that was not "religiously neutral." *Id.* at 122, 125. The holding of *Larkin* was reinforced and expanded upon in *Grumet*, where the Court held that the government "may not delegate its civic authority to a group chosen according to religious criterion." *Grumet*, 512 U.S. at 698.

Lower courts have relied on these cases to invalidate laws that delegated regulatory standard-setting and enforcement duties to religious entities, *see Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), and in one recent case (later vacated on other grounds as moot), to invalidate the selection of a religious charity in a manner that effectively "delegated authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds." *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012), *vac'd sub nom. ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

The interpretation of RFRA urged by the University raises similar infirmities. It is quintessentially the function of the modern regulatory state to determine who receives regulatory benefits. That is undeniably a "power ordinarily vested in agencies of government." *Larkin*, 459 U.S. at 122. While the University is free to refuse to receive or provide such benefits itself, it seeks to preclude the government from stepping in to make the benefits available via third-party arrangements. The University seeks not only to exempt itself, but to

redefine the regulatory relationship between affected women, insurers, and the government. And it seeks to discontinue the flow of governmental benefits for reasons that are admittedly not "religiously neutral." *Id*. at 125. Interpreting RFRA to give the University that right would give the statute an application that conflicts with *Larkin*, *Kiryas Joel*, and the bedrock principal that no law may give a religious organization's beliefs the force of law at the expense of third parties.

"[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation and quotation marks omitted). For all of the reasons set forth above, the Court can—indeed, should—interpret the statute to disallow the exemption that Notre Dame seeks.

Rejecting Notre Dame's conceptualization and application of RFRA would heed not only pre-*Smith* case law, RFRA's legislative history, the canon of constitutional avoidance, and the Establishment Clause, but it would also vindicate the concerns of the Founding Fathers, who themselves recognized the need to cabin religious exemptions that would impose substantial harms on third parties. In the words of James Madison, "I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 The Writings

of James Madison 98, 100 (Gaillard Hunt ed. 1910), *available at* http://bit.ly/1hFKEID.

CONCLUSION

The importance of convenient access to contraceptives is not about convenience *per se*; it is about diminishing unwanted pregnancies and the effects that those pregnancies have on young women's lives and the country's social fabric. RFRA does not require—and, indeed, the Constitution does not allow—the University to invoke its religious views to stop the government from furnishing women with a governmental benefit designed to curtail those effects. The decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Intervenors-Appellees Jane Does 1-3 complies with the type-volume limitations set out for principal briefs in Federal Rule of Appellate Procedure 32(a)(7)(B). The brief, including headings, footnotes, and quotations, contains 13,734 words, as calculated by the WordPerfect word-count function.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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