Case No. 13-1540

In the United States Court of Appeals for the Tenth Circuit

Little Sisters of the Poor Home for the Aged, *et al.*,
Plaintiffs-Appellants,
v.
Kathleen Sebelius, in her official capacity as Secretary of the U.S.
Department of Health and Human Services, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado, Judge William J. Martinez,
No. 1:13-cv-02611-WJM-BNB

Brief of *Amici Curiae* Americans United for Separation of Church and State, American Civil Liberties Union, and American Civil Liberties Union of Colorado in Support of Appellees and Affirmance

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* certify that they are 501(c)(3) nonprofit corporations. None of the *amici* has a corporate parent or is owned in whole or in part by any publicly held corporation.

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Glossary

ACA	Affordable Care Act
ACLU	American Civil Liberties Union
HHS	U.S. Department of Health and Human Services
IOM	Institute of Medicine
RFRA	Religious Freedom Restoration Act

Identity and Interest of *Amici Curiae*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization that seeks to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters, including several thousand residing in this Circuit.

Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Brief of Americans United for Separation of Church and State, *et al.*, as *Amici Curiae* Supporting Respondents, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 2237539 (supporting drug-law exemption for Native American religious practitioners). Consistent with its support for the separation of church and state, however, Americans United opposes the recognition of religious exemptions that impose undue harm on innocent third

parties. To that end, Americans United currently represents three women who have intervened in a parallel case in defense of the regulations now before the Court. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558-59 (7th Cir. 2014).

The **American Civil Liberties Union** is a nationwide, non-profit, non-partisan public-interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution and the nation's civil-rights laws. The **ACLU of Colorado** is one of its state affiliates. The ACLU has a long history of defending the fundamental right to religious liberty, and routinely brings cases designed to protect the right to religious exercise and expression. At the same time, the ACLU is deeply committed to fighting gender discrimination and inequality and protecting reproductive freedom.

In accordance with Federal Rule of Appellate Procedure 29(c)(5), a*mici* state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the

brief's preparation or submission. Both appellees and appellants have consented to the filing of this brief.

<u>Background</u>

Congress enacted the Patient Protection and Affordable Care Act ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), 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 Act requires employers with at least 50 employees either to provide minimally adequate health insurance to their employees, including coverage for preventive care without cost-sharing, or to pay a tax of $2,000 per employee (after the first 30 employees) to defray the cost of public subsidization of the employees' healthcare. *See* 26 U.S.C. § 4980H(a)-(d).

To aid in development of the preventive-care requirements, the U.S. Department of Health and Human Services ("HHS") asked the Institute of Medicine ("IOM"), the nonpartisan "health arm of the National Academy of Sciences," to identify the medical services necessary for women's health and well-being. IOM, *Clinical Preventive*

Services for Women: Closing the Gaps 2 (2011) ("IOM Rep."), http://bit.ly/19XiWHK; *About the IOM*, http://www.iom.edu/About-IOM.aspx.[1] After extensive study, the IOM recommended that coverage be provided for, among other things, all forms of FDA-approved contraceptives. IOM Rep. at 109-10. The federal government adopted that recommendation, thereby requiring contraceptives to be included among the battery of preventive services that health plans must cover. *See* 42 U.S.C. § 300gg-13a; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012)

Before finalizing the regulations and after extensive comment, HHS sought to accommodate religious organizations' objection to the contraception-coverage requirement. HHS exempted houses of worship from the requirement upon finding that they "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. 39,870, 39,874 (July 2, 2013). Other religious non-profit organizations were permitted to opt out of

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[1] All websites cited in this brief were last visited on April 3, 2014.

providing contraceptive coverage by certifying their religious objection to their insurance administrator or provider. *See id*. at 39,873-74. In the event of such an opt out, the administrator or provider must assume responsibility for offering the coverage to the organization's employees at no cost to the organization. *Id*. at 39,876; *see also* 29 C.F.R. §§ 2590.715-2713A(b)(1), (b)(2)(i)-(iii), (c)(2).

Plaintiffs in this case are four related entities: two non-profit corporations that qualify for the Accommodation ("the Non-Profit Plaintiffs"); and the trust and insurance administrator that provide healthcare benefits to the Non-Profit Plaintiffs' employees ("the Insurance-Company Plaintiffs"). Plaintiffs challenge the Accommodation under the Religious Freedom Restoration Act ("RFRA"), as well as various constitutional provisions.

Argument

I. Plaintiffs' Religious Exercise Is Not Substantially Burdened by the Challenged Regulatory Scheme.

The centerpiece of Plaintiffs' lawsuit is a claim that the Accommodation violates the 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.[2] In order to make out a RFRA claim, Plaintiffs must demonstrate that the challenged regulations substantially burden their religious exercise by forcing or substantially pressuring them to violate their religious beliefs. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1312 (10th Cir. 2010).

Plaintiffs have not met this burden. The Non-Profit Plaintiffs claim that the Accommodation imposes a substantial burden because it requires them to submit a form that "triggers" insurance coverage for contraception; and the Insurance-Company Plaintiffs identify a substantial burden in their (contested) legal obligation to furnish contraception coverage upon receipt of the form. Pls. Br. at 28-31. But neither set of Plaintiffs seriously addresses their ability to discontinue the activities that subject them to the challenged regulations in the first place. The Non-Profit Plaintiffs have a "choice for complying with

[2] Because Plaintiffs' constitutional claims have been fully and adequately addressed by the United States, *see* US Br. at 33-38, this brief does not discuss those claims.

the law—provide adequate, affordable health coverage to employees or pay a tax," *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 98 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 683 (2013), at a fraction of the price of employer-provided healthcare. Similarly, the Insurance-Company Plaintiffs are free to avoid any legal obligations related to the Accommodation by insuring only churches and their integrated auxiliaries. Plaintiffs are simply not "force[d] . . . to do what their religion tells them . . . not [to] do." *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013).

Moreover, even if the Non-Profit Plaintiffs were somehow forced to retain their insurance and to avail themselves of the Accommodation, any burden on their religious exercise would still be legally insubstantial as mere objections to the independent rights and obligations of third parties.

A. Plaintiffs may comply with the law and avoid religious injury altogether.

To demonstrate a substantial burden, Plaintiffs must show that the challenged regulations "(1) require[ ] participation in an activity prohibited by a sincerely held religious belief, or (2) prevent[ ]

participation in conduct motivated by a sincerely held religious belief, or (3) place[ ] substantial pressure" on Plaintiffs regarding either of the above. *Abdulhaseeb*, 600 F.3d at 1315. A paradigmatic substantial burden arises when individuals are "compelled to choose between their livelihoods and their faith," *Korte*, 735 F.3d at 679, or when laws "affirmatively compel[ ] [individuals], under threat of criminal sanction," to violate their religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

"[W]here the claimant is left with some degree of choice in the matter . . . [the Court must] inquire into the degree of the government's coercive influence" to violate his or her religious beliefs. *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014). Under that inquiry, a burden is not substantial when it merely "operates so as to make the practice of [an adherent's] religious beliefs more expensive." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). In *Braunfeld*, the Supreme Court rejected a challenge by Orthodox Jewish businessmen to a Sunday closing law that they alleged would "put [them] at a serious economic disadvantage if they continue[d] to adhere to their Sabbath." *Id.* at 602.

The Court reasoned that the law did not render the plaintiffs' religious exercise impracticable, and that the Court could not insulate religious business people from the need ever to weigh their beliefs when making business decisions 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" 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"); *Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Cntys.*, 735 F.2d 388, 391 (10th Cir. 1984) (forcing teacher to take unpaid leave to celebrate religious holiday not a substantial burden).

In a similar vein, when an adherent has a viable alternative means to satisfy his or her religious obligation—even if relatively inconvenient or otherwise inferior—the burden is deemed

insubstantial. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (employees' ability to receive in-kind wages, or to return cash payments to employer, provides alternative means that ameliorate burden otherwise caused by fair-wage regulation); *Shabazz v. Parsons*, No. 95-6267, 1996 WL 5548, *2 (10th Cir. Jan. 8, 1996) (unpublished) (denial of access to certain religious materials does not substantially burden religious exercise when prisoner "still is [otherwise] capable of expressing his adherence to his faith"). As this Court has observed, "[i]t is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found" and "another thing to require a believer to . . . do[ ] something that is completely forbidden by the believer's religion." *Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (quoting *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993).

Taken together, these cases stand for the proposition that a substantial burden exists only when a law expressly requires an adherent to violate their religion or "present[s an adherent] with a Hobson's choice" between their livelihood and their faith, *Abdulhaseeb*,

600 F.3d at 1317, not when a law merely operates so as to make an adherent's religious practice more expensive, *see Braunfeld*, 366 U.S. at 605, or less convenient, *see Strope v. Cummings*, 381 F. App'x 878, 881-82 (10th Cir. 2010).

1. The Non-Profit Plaintiffs may drop their insurance and pass the savings on to their employees.

Plaintiffs contend that "there are only two ways the Little Sisters could comply" with the law: provide insurance coverage for contraception directly, or avail themselves of the Accommodation. Pls. Br. at 17. Otherwise, according to Plaintiffs, they would suffer "crippling . . . annual penalties." Pls. Br. at 11; *see also id.* at 26 ("[T]he mandate's severe financial penalties impose enormous pressure on the Little Sisters to give up their religious exercise and sign and send."). But the Non-Profit Plaintiffs disregard a viable third option: they may discontinue their health-insurance plan—and thereby trigger publicly subsidized insurance for their employees—by paying a tax amounting to a mere fraction of what they currently spend on health insurance.

The pertinent part of the new healthcare law is 26 U.S.C. § 4980H, a provision titled "Shared responsibilities for employers." If an employer does not offer a health-insurance plan, its employees become eligible for public health-insurance subsidies. When an eligible employee applies for subsidized health insurance on a public exchange, and her employer has more than 50 employees, the employer becomes obligated to make "assessable payments" to the IRS amounting to $2,000 per employee (discounting the first 30 employees) per year. *Id.*

This payment is a tax, both in name, *see id*. § 4980H(c)(7), and substance. As the Fourth Circuit recently observed in *Liberty University*, 733 F.3d at 96, the assessable payments generate governmental revenue, and so present the essential feature of a tax. 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. These attributes further demonstrate that the assessable payments are in fact a tax. *See NFIB*, 132 S. Ct at 2595-97.

Moreover, the payment 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. Indeed, the assessable payment amounts to less than half the average per-employee cost of employer-provided healthcare in Colorado ($4,169) and Maryland ($4,187). The Henry J. Kaiser Family Foundation, *Average Single Premium per Enrolled Employee for Employer-Based Health Insurance* (2012), http://bit.ly/1eVfSK6. Because the tax is paid instead of healthcare-insurance premiums, choosing to pay the tax would likely *save* the Non-Profit Plaintiffs money.

Accordingly, *Liberty University* 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." 733 F.3d at 98.[3] Indeed, many view the

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[3] The Plaintiffs would have no valid RFRA objection to this payment, as the Supreme Court has repeatedly rejected challenges to general taxation schemes. *See, e.g., United States v. Lee*, 455 U.S. 252, 257-59 (1982); *Hernandez v. Comm'r*, 490 U.S. 680, 699-700 (1989); *Jimmy Swaggart Ministries,* 493 U.S. at 391.

latter option as preferable, as explained in a publication of the University of Notre Dame, itself a plaintiff in a parallel case. *See* 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; *see also* Ross Manson, *Health Care Reform: to "Pay or Play?"*, Eide Bailly, http://tinyurl.com/ocjgmxf. Because the new healthcare law makes health insurance available at affordable and subsidized rates, irrespective of age, income, or medical condition, discontinuing health insurance does not carry the negative consequences to employees that it once did.

The viability of this option was not addressed in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, — U.S. —, 134 S.Ct. 678 (2013). There, the Court assumed that the ability to drop health-insurance coverage and pay the tax presented the plaintiffs in that case with a "Hobson's choice." *Id.* at 1141. But that was because the United States conceded "the significance of the financial burden" and no *amici* advanced a contrary argument. *Id.* Because it was never presented to the Court, the issue was not decided.

See Vance v. Ball State Univ., 133 S. Ct. 2434, 2447 (2013) (undisputed issue that was not squarely before a court in previous case not decided for purposes of subsequent cases).

Plaintiffs largely fail to address this option in their brief. Plaintiffs' complaint alludes to "a severe competitive disadvantage" the Non-Profit Plaintiffs may suffer should they drop their insurance. Compl., Sept. 24, 2013 (Doc. No. 1) ¶ 112. Far from establishing a likelihood of success on the merits necessary for equitable relief, such conclusory allegations are insufficient to state a claim "above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint does not explain why the Non-Profit Plaintiffs are unable to mitigate that disadvantage by passing on their potential savings to their employees in the form of higher wages or a healthcare stipend. More importantly, the complaint fails to demonstrate that any such disadvantage would do more than make the Non-Profit Plaintiffs' operations more expensive—a consequence that does not rise to a "constitutionally significant" level. *Jimmy Swaggart Ministries*, 493 U.S. at 392. The law does not insulate religious businesses from ever

the need to make "some financial sacrifice in order to observe their religious beliefs." *Braunfeld*, 366 U.S. at 606.

The Non-Profit Plaintiffs mention in passing that they are religiously compelled to further the well-being of their employees, and that they do so by providing health insurance. Compl., Sept. 24, 2013 (Doc. No. 1) ¶ 111. Again, Plaintiffs are free to further the well-being of their employees through alternative means such as higher wages or a healthcare stipend. At most, the law merely "curtail[s] [one] way[ ] of expressing belief, for which alternative ways . . . may be found." *Beerheide*, 286 F.3d at 1192. Plaintiffs are no more entitled to satisfy their religious needs by directly furnishing health insurance than a congregation is to brush aside reasonable zoning regulations in selecting its preferred spot for constructing a church. *Cf. Messiah Baptist Church v. Cnty. of Jefferson, State of Colo.*, 859 F.2d 820, 826 (10th Cir. 1988) (church does not have a religious right "to build its house of worship where it pleases" free from zoning restrictions). Plaintiffs have not alleged that direct provision of insurance is the only way to satisfy their religious obligations—nor could they credibly do

so—and RFRA does not entitle them to the most convenient manner of maintaining compliance with religious directives. *See Strope*, 381 Fed. App'x. at 881-82.

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 choose to drop their plans for any number of reasons—whether to provide employees with a wider range of coverage choices, to reduce costs, to minimize paperwork, or to maintain religious scruples. There is no reason that RFRA should spare Plaintiffs this choice, simply because religion is part of their decision-making calculus.

2. The Insurance-Company Plaintiffs are free to insure only exempt employers.

The Insurance-Company Plaintiffs concede that it is unclear whether the challenged regulations apply to them, Compl., Sept. 24, 2013 (Doc. No. 1) ¶ 148, and the United States maintains that these Plaintiffs cannot be subjected to any enforcement action. US Br. at 18-

19. But even if the regulations were applicable to, and could be enforced against, the Insurance-Company Plaintiffs, these Plaintiffs' religious exercise would still not be substantially burdened because they would remain free to limit their services to churches and church-funded and controlled organizations that are exempt from the challenged regulations. *See* 26 C.F.R. § 1.6033–2(h)(5) (noting that relevant organizations include "[m]en's and women's organizations, seminaries, mission societies, and youth groups"); 45 C.F.R. § 147.131.

The Insurance-Company Plaintiffs allege that they would suffer "substantial financial burdens" if they were to limit their services to exempt clients. *See* Compl., Sept. 24, 2013 (Doc. No. 1) ¶ 153. But while they allege that this change could expose them to yearly losses of over $10 million in net revenue, Pls. Br. at 19, they do not discuss the impact of that loss on their financial well-being. *See World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) ("[W]hether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question."). In fact, the Christian Brothers Trust reported roughly $20

million in profits and a $30 million increase in net assets in 2012, *see* Christian Brothers Trust, 2012 Form 990 (2013), *available at* http://bit.ly/1gNLBvx. If this is any indication, the Insurance-Company Plaintiffs could continue to operate comfortably in the black should they choose to insure only exempt organizations. Plaintiffs do not claim otherwise.

The *Braunfeld* plaintiffs likewise complained of "substantial economic loss" and "serious economic disadvantage" they would suffer by reconciling their religious and legal obligations, *Braunfeld*, 366 U.S. at 602, but the law did not spare them the necessity of obeying the law so long as they could. In "a cosmopolitan nation made up of people of almost every conceivable religious preference," the law cannot feasibly equalize the impact of legislation on adherents who may realistically comply without religious injury. *Id*. at 606; *see also Jimmy Swaggart Ministries*, 493 U.S. at 391 (law that creates "lower demand for appellant's [religious] wares" does not impose "constitutionally significant burden" unless it "effectively choke[s] off an adherent's religious practices").

Like a kosher butcher—who limits his commercial activity for religious reasons and so limits his profits—"[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. RFRA exists to protect the conscience of an adherent who would otherwise be forced to violate his or her religion, not to insulate the ledger of a religious corporation from expenses incurred through religious practice. *See Braunfeld*, 366 U.S. at 606.

Likewise, while the Insurance-Company Plaintiffs may feel that providing health benefits to Catholic charities is an important aspect of their religious exercise, *see* Compl., Sept. 24, 2013 (Doc. No. 1) ¶ 153, it does not follow that a substantial burden results from being unable to minister to *every* Catholic charity of their choosing. Plaintiffs—who may continue to insure some charitable Catholic institutions, namely churches and church-funded and controlled organizations, whatever the result here—have not claimed that there is any religious requirement

to insure a particular subset of religious institutions. *Cf. Kikumura v. Hurley*, 242 F.3d 950, 961 n.6 (10th Cir. 2001) (no substantial burden results from denial of access to a specific priest unless adherent demonstrates specific reason for requiring such access); *see also Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden where law "leaves ample avenues open . . . to express [an adherent's] deeply-held belief"). In fact, given that many Catholic institutions have chosen to avail themselves of the Accommodation, the Insurance-Company Plaintiffs cannot realistically expect to be able to insure every Catholic organization without exception.

B. The Accommodation does not impose a substantial burden.

Even if the Non-Profit Plaintiffs were somehow required to avail themselves of the Accommodation, their religious exercise would still not be substantially burdened because the Accommodation permits them to opt out of furnishing the coverage to which they object.[4]

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[4] If the Non-Profit Plaintiffs were to pursue the Accommodation, there would likewise be no substantial burden on the Insurance-Company Plaintiffs for all of the reasons that the United States advances. *See* U.S. Br. at 18-19.

A burden is not substantial under RFRA simply because a litigant says so; "substantiality . . . is for the court to decide." *Univ. of Notre Dame*, 743 F.3d at 558. This Court has "cautioned that not 'every infringement on a religious exercise will constitute a substantial burden.'" *Strope*, 381 Fed. App'x. at 881 (quoting *Abdulhaseeb*, 600 F.3d at 1316). 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). 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). "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).

"The process of claiming one's exemption from the duty to provide contraceptive coverage is the opposite of cumbersome[;]" it "amounts to signing one's name and mailing the signed form to two addresses." *Univ. of Notre Dame*, 743 F.3d at 558. To accept that the need to put one's objection in writing can itself be a substantial burden on religion would be both "paradoxical and virtually unprecedented." *Id.* at 557. Indeed, Plaintiffs have not cited a single case in which an exemption itself has been found to substantially burden religious practice. *See also* Oral Argument at 27:40, *Univ. of Notre Dame*, 743 F.3d 547 (No. 13-3853), *available at* http://1.usa.gov/1faPzU4 (counsel in related litigation unable to think of such a case); *cf. Sledge v. Cummings*, 69 F.3d 548, 548 (10th Cir. 1995) (affirming district court holding that "institution's requirement that an inmate submit a form electing to participate in religious activities does not impose a substantial burden on the exercise of religion").

The Non-Profit Plaintiffs claim that they cannot submit the form in question because that would "trigger" a third party's obligation to take on the responsibilities Plaintiffs have shed. Pls. Br. at 36. But that

result inheres in virtually all instances of conscientious objection. A wartime conscientious objector cannot refuse to register for an exemption on the ground that doing so would result in the government's drafting another in his place. *Cf. Univ. of Notre Dame*, 743 F.3d at 556 (observing that Plaintiffs' position necessarily leads to this result). A judge who seeks recusal from a death-penalty case cannot claim a RFRA right to refuse to recuse in writing so as to avoid facilitating the assignment of a new judge to hear the case.

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 submission of the form. The effect of the form is to *relieve* the conscientious objector itself of its obligation to perform the objectionable act and to place the obligation elsewhere.

Plaintiffs have no religious right to prevent the government from imposing that coverage obligation on others. The Native Americans in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439

(1988), could not disrupt a governmental forestry project, even one that would "virtually destroy [their] ability to practice their religion." *Id.* at 451 (quotation marks omitted). The plaintiffs in *Bowen v. Roy*, 476 U.S. 693, 696, 699-700 (1986), could not prevent the government from using a social-security number for their daughter, even though they believed that the practice would rob her of her spirit.

Likewise here, the Non-Profit Plaintiffs are not entitled to impede a regulatory relationship between the government and third parties. Indeed, Plaintiffs' position "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, 2013 WL 6729515, at *2 (D.D.C. Dec. 20, 2013).

II. Removing Barriers to Insurance Coverage for Contraceptives Is the Least Restrictive Means of Furthering Compelling Governmental Interests.

There are compelling interests in applying the challenged regulations to the Plaintiff class: providing the organizations' employees with access to a benefit essential to their well-being, reducing unintended pregnancies and, in turn, reducing the need for abortions, ensuring that female employees do not face substantially higher costs than their male counterparts in meeting healthcare needs, and ensuring women's ability to participate equally in society by deciding whether and when to become parents. Indeed, Plaintiffs do not specifically contest that the government's interests are compelling. Rather, Plaintiffs merely note that the government has not pressed the compelling-interest argument here in light of this Court's decision in *Hobby Lobby*. *See* Pls. Br. at 28.

But this case is not *Hobby Lobby*; the Accommodation presents a distinct balance of interests meriting separate attention. *Hobby Lobby* addressed whether for-profit companies and their owners could be required to provide coverage of contraception without cost-sharing

under the companies' health-insurance plan; the majority reasoned that the contraception regulations applicable to for-profit corporations were too under-inclusive for the government to have a compelling interest in applying them to the *Hobby Lobby* plaintiffs, and in any event the government had failed to give particularized reasons for doing so in that case. 723 F.3d at 1143-44. Plaintiffs' interests, however, are comparatively minimal—the Accommodation alleviates the requirement for religious non-profits to subsidize contraception—while the government's interests in ensuring the health and welfare of women, and in redressing gender inequities, remain paramount. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

Moreover, in *Hobby Lobby*—which involved a single for-profit corporation and its owners—the panel concluded that the United States cited only "broadly formulated" interests in women's health and equality, and improperly failed to tailor its reasoning to the specific organization in that case. *See* 723 F.3d at 1143. But Plaintiffs have brought this suit as a class action on behalf of hundreds of organizations not before the Court. *See* Compl., Sept. 24, 2013 (Doc. No.

1) ¶ ¶ 16, 18. As such, the government's interest in applying the regulations in this case can necessarily only be discussed at a higher level of generality than in *Hobby Lobby*.

As the IOM concluded, women have different, and more costly, health needs than men. IOM Rep. at 18; Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending by Gender and Age: 2004 Highlights*, http://go.cms.gov/ 1iDkoSB (women aged 19-44 spent 73% more per capita on health care than male counterparts). Many of the most effective contraceptive methods carry a high up-front cost, which forecloses access for many women. IOM Rep. at 108. The disproportionately high cost of preventive services, in tandem with the historical disparity in women's earning power, creates cost-related barriers to "medical tests and treatments and to filling prescriptions for [women] and their families." *Id.* at 18-19. These barriers to preventive care "are so high that [women] avoid getting [the services] in the first place." 155 Cong. Rec. 29,302 (2009) (statement of Sen. Mikulski).

Consequently, 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. Forty-two percent of these women obtain an abortion, *id.*, while others carry to term a child for which they may be unprepared. Among the latter group, unintended pregnancy is associated with negative consequences for both mother and child. *See* IOM Rep. at 103 (unintentionally conceived infant more likely to be born prematurely); Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 Guttmacher Rep. on Pub. Pol'y 5, 6 (2004), http://bit.ly/1j0sEtY ("Women who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community.").

The 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." IOM Rep. at 104 (quotation marks omitted). Because "even moderate copayments for preventive services" substantially deter women who

might otherwise avail themselves of such services, *id.* at 19, reducing or eliminating costs for contraception leads women to rely on more effective methods, *id.* at 109. Furthermore, as indicated in many public comments that the government received, reducing not just costs, but logistical barriers, further increases women's access to needed contraceptives. *See, e.g.,* Hal C. Lawrence, *Comment of the American Congress of Obstetricians and Gynecologists Re: NPRM: Certain Preventive Services Under the Affordable Care Act, CMS-9968-P*, April 8, 2013, *available at* www.regulations.gov.

These comments and conclusions find support in myriad social-science studies, which demonstrate that even exceedingly low barriers, whether financial or logistical, can deter people from accessing benefits and services. Because "people may decline to change from the status quo even if the costs of change are low and the benefits substantial," "[i]t 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 (Feb. 16, 2013), Oxford Handbook of Behav. Econ. & the Law (Eyal Zamir & Doron Teichman eds.) (forthcoming), http://ssrn.com/abstract=2220022.

Indeed, removing minor cost or logistical barriers can dramatically increase consumption. *See* Kristina Shampan'er & Dan Ariely, *Zero as a Special Price: The True Value of Free Products* (2007), http://bit.ly/1iy2eSp. When Amazon inadvertently imposed a 10-cent shipping price for goods sent to one European country, while dropping the shipping price to zero for other countries, sales soared in the latter context and remained largely unchanged in the former. *Id.* at 40. Similarly, moving a bowl of food mere inches away, or making food more difficult to eat by changing the utensil provided, can lead to a substantial decrease in consumption. Paul Rozin et al., *Nudge to Obesity I: Minor Changes in Accessibility Decrease Food Intake*, 6 Judgment & Decision Making 323 (2011), http://bit.ly/1jPM20r. One study found that if employees are faced with a default rule in which they automatically contribute 3% of their income to a 401(k) plan, very few employees opt out; but a majority of employees will not make any

contributions in the absence of an enrollment-by-default rule. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Quarterly J. of Econ. 1149 (2001), http://bit.ly/1ftWFDi.

Women's use of contraception reflects this phenomena. One study showed that when condom prices rise from zero to merely 25 cents, sales decline by 98%. *See* Deborah Cohen et al., *Cost as a Barrier to Condom Use: The Evidence for Condom Subsidies in the United States*, 89 Am. J. of Pub. Health 567, 567 (1999), http://1.usa.gov/ 1b1Q1gV. And making oral contraceptives only slightly less convenient (dispensing them quarterly rather than annually) resulted in a 30% greater chance of unintended pregnancy, and a 46% greater chance of abortion. *See* Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 Obstetrics & Gynecology 566, 566 (2011), http://bit.ly/1ebyZRQ.

By contrast, in another study, when the most convenient forms of contraception—those requiring the least effort to maintain—were made available at no cost to young women, the rate of unintended pregnancy

dropped by 80%, leading researchers to predict that the regulations at issue in this case 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 Accommodation heeds this social-science data; it seeks to eliminate barriers to contraceptive access—by allowing women to receive coverage from their existing healthcare provider—while, at the same time, ensuring that religiously affiliated entities are entitled to opt out of covering services that they find objectionable. In contrast, every alternative approach suggested by Plaintiffs would balkanize women's access to contraception. *See* Mot. for Prelim. Inj., Oct. 24, 2013 (Doc. No. 15) at 8-9. The Accommodation therefore constitutes the least restrictive means to accomplish the government's compelling goals

In meeting the strict-scrutiny standard, 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." *United States v. Wilgus*, 638 F.3d 1274, 1288 (10th Cir. 2011). "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.'" *Id.* at 1289 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring)).

III. The Establishment Clause Forbids the Relief That Plaintiffs Seek.

Plaintiffs' interpretation of RFRA would exceed Establishment Clause limitations because it would override significant third-party interests, and grant a religious veto over the regulatory rights and obligations of third parties. Pursuant to the canon of constitutional avoidance, this interpretation of RFRA should be rejected.

A. The Establishment Clause does not permit religious exemptions that cause significant third-party harms.

The Establishment Clause forbids recognition of religious exemptions that override other significant interests. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), 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 "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath," and 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 709-710 (quotation marks omitted); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.) (sales-tax exemption limited to religious periodicals impermissibly "burden[ed] nonbeneficiaries by increasing their tax bills"). As the Court recently held in upholding the Religious Land Use and Institutionalized Persons Act against an Establishment Clause challenge, any accommodation "must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

The Supreme Court's free-exercise jurisprudence reflects these same considerations. In *Lee*, 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." 455 U.S. at 261. And in *Braunfeld*,

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." 366 U.S. at 608-09. 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 an exemption from public-school-attendance requirements 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."[8]

Plaintiffs urge an interpretation of RFRA that would override the interests of women who otherwise cannot afford contraceptives. For these women, the regulations at issue provide a lifeline to security in

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[8] To the extent the Court has ever approved religious exemptions that potentially harm third parties, it has done so only when the exemption preserves religious associational values. *See Texas Monthly*, 489 U.S. at 18 n.8. Thus, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Court held that the Establishment Clause permitted, and in *Hosanna-Tabor Evangelical Lutheran Church & School 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.

their bodies and futures—personal autonomy interests that lie "[a]t the heart of liberty." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Because Plaintiffs brought this suit as a class action, the relief they seek would curtail access to vital health benefits not only for over 100 employees now before the Court, *see* Compl., Sept. 24, 2013 (Doc. No. 1) ¶ 15, but for untold thousands more, *id.* ¶ 18. This does not strike a "measured" balance, *Cutter*, 544 U.S. at 722, and cannot be squared with the Establishment Clause.

B. The Non-Profit Plaintiffs seek an unconstitutional religious veto over the flow of regulatory benefits to third parties.

The relief that the Non-Profit Plaintiffs seek—the ability to prevent employees from receiving access to health benefits from third parties—is not an exemption, as that term is normally understood; rather, it is a veto. Plaintiffs' claim that RFRA entitles them to this outcome cannot be reconciled with *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which struck down a law that vested religious organizations with the authority to veto liquor-license applications of nearby establishments. "The 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*, 459 U.S. at 127). The *Larkin* Court was particularly troubled by the prospect that a "power ordinarily vested in agencies of government" could be wielded in a manner that was not "religiously neutral." 459 U.S. at 122, 125.

Plaintiffs' interpretation of RFRA is similarly infirm. Delineating access to regulatory benefits is undeniably a "power ordinarily vested in agencies of government." *Id.* at 122. While Plaintiffs may refuse to receive or provide such benefits themselves, they cannot preclude the government from making the benefits available via third-party arrangements. Plaintiffs seek to redefine the regulatory relationship between affected women, insurers, and the government—for reasons that are admittedly not "religiously neutral." *Id.* at 125. The Constitution forbids this result.

* * *

Privileging Plaintiffs' religious interests over the interests of countless women in obtaining contraceptive coverage—and giving Plaintiffs veto power over the flow of benefits between third parties—would place RFRA at odds with the Establishment Clause. "[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 should interpret the statute to disallow the exemption that Plaintiffs seek.

CONCLUSION

This Court should affirm the lower court's decision.

Respectfully Submitted,

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April 3, 2014

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I hereby certify to the following:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,938 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in WordPerfect, Century Schoolbook, 14-point font.

/s/ *Ayesha N. Khan*
Ayesha N. Khan

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I certify that, with respect to this brief of amici curiae,

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/s/ *Ayesha N. Khan*
Ayesha N. Khan

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On April 3, 2014, I electronically filed the foregoing brief with the Clerk of this Court through the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

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