Case No. 14-12696

In the United States Court of Appeals
for the Eleventh Circuit

Eternal Word Television Network, Inc.,

Appellant,

v.

Sylvia Burwell, Secretary of the United States Department of Health and Human Services, et al.,

Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama

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

---

Ayesha N. Khan
Counsel of Record
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW, Suite 850E
Washington, DC 20005
(202) 466-3234
khan@au.org

Counsel for Amici Curiae

Case No. 14-12696 - Eternal Word Television v. Burwell

Corporate Disclosure Statement and Certificate of Interested Persons

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certifies that *amici* are 501(c)(3) nonprofit corporations that have no parent entities and do not issue stock. Pursuant to Eleventh Circuit Rule 26.1-1, counsel for *amici* further certifies that, to the best of counsel's knowledge, only the following interested parties have been omitted from the various certificates filed thus far in this case:

Americans United for Separation of Church and State (*amicus curiae*)

Khan, Ayesha N. (counsel for *amicus curiae*)

/s/ Ayesha N. Khan
Ayesha N. Khan

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

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 Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), 2004 WL 2945402 (supporting religious accommodations for prisoners). 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 the student-intervenors in

University of Notre Dame v. Sebelius, 743 F.3d 547, 558-59 (7th Cir. 2014), in defense of the regulations now before the Court.

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 Alabama** 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.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states the following: (1) no party's counsel authored this brief in whole or in part, and (2) 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. All parties have consented to the filing of this brief.

Background

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). The Act requires employers with at least 50 employees either to provide minimally adequate health insurance to their employees or to pay a tax to defray the cost of public subsidization of the employees' healthcare. *See* 26 U.S.C. § 4980H(a)-(d). It separately requires providers and health-plan administrators to provide coverage for preventive care without cost-sharing. *See* 42 U.S.C. § 300gg-13(a).

To aid in development of the preventive-coverage requirement, the United States 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-13(a); 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012).

After receiving extensive comments regarding religious organizations' objections to providing coverage for contraceptives, the federal government chose to exempt houses of worship from the contraceptive-coverage requirement, and to authorize other religious non-profit organizations to opt out of providing contraceptive coverage by sending a government form to their healthcare provider or plan administrator, which then separately arranges and provides for the coverage. *See* 29 C.F.R. §§ 2590.715-2713A(b)(1)-(2), (c)(2); 78 Fed. Reg. 39,870, 39,873-76 (July 2, 2013) (hereinafter "the first Accommodation").

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

In August, in response to the United States Supreme Court's issuance of an order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (order granting injunction pending appeal), the federal government provided a second means for objecting employers to opt out of the contraceptive-coverage requirement. Under that regime, a religious non-profit may opt out by notifying HHS of its religious objection, the nature of its health plan, and the identity of its provider or administrator. No specific form or set of words is required to convey this information, and the non-profit need not inform its provider or administrator of its objection. *See* 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). Thereafter, the federal government independently arranges for the objecting organization's insurance provider or administrator to offer contraceptive coverage without involving, and at no cost to, the objecting organization. *Id.* at 51,095 (hereinafter "the second Accommodation").

Plaintiff's challenge is brought under the Religious Freedom Restoration Act ("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. Plaintiff has argued that pursuing the first Accommodation "triggers" the provisioning of contraceptives, thereby substantially burdening Plaintiff's exercise of religion, and that the regulatory scheme fails to satisfy strict scrutiny. *See* Pl. Br. at 21-50. Plaintiff has not yet addressed the second Accommodation in any filing in this case, but is apparently continuing to press its claim notwithstanding the new regulatory opt-out.

Argument

In order to make out a RFRA claim, Plaintiff must make a prima facie showing that the challenged regulations substantially burden its religious exercise. Plaintiff has failed to make this showing because asserting an opt-out imposes an insubstantial burden as a matter of law, and nothing in RFRA allows Plaintiff to interfere with the government's decision to impose insurance-coverage obligations on third parties.

Even if Plaintiff could show a substantial burden, the Accommodations serve the government's compelling interests in promoting women's health, decreasing the number of unintended pregnancies, and eliminating significant healthcare-cost disparities

between men and women. Furthermore, women's existing healthcare plans provide the least restrictive means of accomplishing the government's goals. The fact that there are other exceptions to the contraceptive-coverage requirement does nothing to alter the compelling nature of the government's interests.

I. Plaintiff's Religious Exercise Is Not Substantially Burdened by the Challenged Regulations.

A. Plaintiff's conclusory assertion of a substantial burden is not entitled to deference.

While RFRA's first draft prohibited the government from imposing any burden whatsoever, *see* 138 Cong. Rec. 18,018 (1992), 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. 26,180 (1993) (statement of Sen. Hatch). As Congress explained, RFRA does "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.

This Court has followed Congress's lead, concluding that a burden on religious exercise must "place more than an inconvenience on

religious exercise" to be deemed substantial. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). In this Court's view, a contrary interpretation of the statute "would require [a court] to find a substantial burden whenever any request in connection with a sincere religious belief was denied" and "result in the word 'substantial' in § 2000cc–1(a) . . . being mere surplusage." *Smith v. Allen*, 502 F.3d 1255, 1278 (11th Cir. 2007), *abrogated on other grounds by Sossamon v. Texas*, 131 S. Ct. 1651 (U.S. 2011).

A burden will *not* be found substantial simply because a litigant says it is; "substantiality . . . is for the court to decide." *Univ. of Notre Dame*, 743 F.3d at 558; *see also Smith*, 502 F.3d at 1278 (litigant's "own assertion" of substantial burden "is not sufficient to meet the threshold of a substantial burden"); *Smith v. Governor for Alabama*, 562 F. App'x 806, 813 (11th Cir. 2014) (plaintiff's assertion of substantial burden insufficient to establish "more than a mere inconvenience on his religious exercise"). Thus, a court must independently assess whether a plaintiff's articulated religious injury—even if sincerely held and deeply felt—is "substantial" as a matter of law. *See Smith*, 502 F.3d at 1278.

That is not to say that the Court can reject an assertion of a burden on the ground that the plaintiff's religious views are irrational or outlandish, *see Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981), or on the ground that the objection is not central to 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 a plaintiff is itself burdened by the challenged regulations or if, instead, it seeks to tie the hands of independent third parties.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988), 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." 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.

In *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008), the D.C. Circuit 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) (alterations in original).

Plaintiff thus errs in urging that a claimant's view of whether an act produces a religiously offensive consequence is irrefutably controlling. *See* Pl. Br. at 22-27. It "ask[s] the court to defer not only to [its] belief [about] the accommodation . . . , but also to defer to [its] understanding of how the regulatory measure *actually works*." *Mich.*

Catholic Conf. v. Burwell, 755 F.3d 372, 385 (6th Cir. 2014) (emphasis in original). The Court should reject that invitation, as "there is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept plaintiffs' characterization of [a] regulatory scheme." *Id.* at 384 (quoting *Roman Catholic Archbishop of Washington v. Sebelius*, __ F. Supp. 2d __, No. 13-1441, 2013 WL 6729515, at *14 (D.D.C. Dec. 20, 2013)).

B. Neither the opt-out mechanisms, nor the regulations' imposition of a coverage obligation on third parties, substantially burdens Plaintiff's religious exercise.

The effect of the Accommodations is simply to render an entity "effectively exempted . . . from the contraceptive mandate." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014). As both the Sixth and Seventh Circuits recently observed, the regulatory scheme does not substantially burden religious exercise because an entity is not burdened by affirmatively opting out of an obligation to which it objects, or by the government's decision to impose an obligation on third parties. *See Univ. of Notre Dame*, 743 F.3d at 557-58; *Mich. Catholic Conf.*, 755 F.3d at 390.

"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 [a letter]." *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, Plaintiff has not cited a single case in which exercising a religious accommodation itself was 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/1j8c5to (counsel unable to think of such a case).

Plaintiff argues that the burden lies in the fact that memorializing its objection results in a third party's assuming the responsibilities that Plaintiff has shed. But that could be said of all religiously motivated opt-outs. 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. A judge who seeks recusal from a death-penalty case cannot claim a RFRA right not to recuse in writing so as to avoid

facilitating the assignment of a new judge to hear the case. *See id.* at 554; *Mich. Catholic Conf.*, 755 F.3d at 387.

In those instances, as here, the opt-out does not "trigger" what comes later; rather, it *relieves* the conscientious objector of an obligation. The assumption of that obligation by someone else is "triggered" by the operation of law. Indeed, Plaintiff's insurance administrator is independently obligated to cover contraceptives. *See* 42 U.S.C. §§ 300gg-13(a), (a)(4) (requiring a "group health plan" or "health insurance issuer" to "provide coverage for . . . preventive care"); *Mich. Catholic Conf.*, 755 F.3d at 387-88.

Plaintiff cannot be burdened by a regulatory scheme that requires it to do nothing beyond what it has always done—namely, to ask its insurance provider not to provide beneficiaries with contraceptive coverage. *See Thomas*, 450 U.S. at 718 (substantial burden arises only when one is pressured to "modify" one's behavior). Indeed, Plaintiff's 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*, 2013 WL 6729515, at *2.

"Perhaps [Plaintiff] would like to retain the authority to prevent [its] . . . administrator from providing contraceptive coverage to [its] employees, but RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely based upon religion." *Mich. Catholic Conf.*, 755 F.3d at 389 (quotation marks omitted). The Native Americans in *Lyng* could not disrupt a governmental forestry project, even one that would "virtually destroy [their] ability to practice their religion." 485 U.S. at 451 (quotation marks omitted). The plaintiffs in *Bowen* could not prevent the government from using their daughter's social-security number even though they had "triggered" that use by seeking welfare benefits. 476 U.S. at 696, 699-700. Similarly here, Plaintiff's "inability to restrain" a regulatory relationship between the government and third parties that "conflicts with the [its] religious beliefs" does not, as a matter of law, impose a substantial burden on its religious exercise. *Mich. Catholic Conf.*, 755 F.3d at 288 (quotation marks omitted).

II. Women's Existing Healthcare Plans Provide the Least Restrictive Means of Advancing the Government's Compelling Interests in Providing Women With Access to Contraceptives.

Even if the Accommodations were found to substantially burden Plaintiff's religious exercise, they should nonetheless be upheld because they withstand strict scrutiny.

A. The regulations serve compelling governmental interests.

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 (finding that women aged 19-44 spent 73% more per capita on healthcare than male counterparts). Furthermore, many of the most effective contraceptive methods used by women—for example, IUDs—carry a high up-front cost. 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 [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 unintended pregnancies end in abortion. *Id.* A woman who carries an unintended pregnancy to term faces an increased risk of having an underweight, premature infant, suffering depression and domestic abuse, and experiencing other negative consequences. *See id.* at 103.

The government thus has a compelling interest in providing women, including Plaintiff's female employees, with access to essential benefits as a means of reducing unintended pregnancies (and in turn, reducing the need for abortions), eliminating significant disparities in healthcare costs between them and their male counterparts, and ensuring their equality and liberty to decide whether and when to become parents. "[E]liminating discrimination and assuring [ ] citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*,

468 U.S. 609, 624 (1984). So, too, does the advancement of public health. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944).

Indeed, in *Hobby Lobby*, the Court "assume[d] that the interest in guaranteeing cost-free access to [FDA-approved] contraceptive methods is compelling within the meaning of RFRA." 134 S. Ct. at 2780. Justice Kennedy—providing the critical fifth vote in the case—joined the majority with the understanding "that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees"—an understanding he deemed "important to confirm" expressly. *Id.* at 2786 (Kennedy, J., concurring).

B. The regulations employ the least restrictive means of achieving the government's compelling interests.

To demonstrate least restrictive means, the government must "show[ ] that no efficacious less restrictive measures exist." *Knight v. Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013). That showing is easily made here: offering women contraceptive coverage outside the framework of their existing healthcare plans would subject them to logistical and cost barriers that would impede their access to, and

diminish their reliance on, birth control, and thereby frustrate the government's goals.

The government concluded that "even moderate copayments for preventive services" substantially deter women who might otherwise avail themselves of contraceptive services. IOM Rep. at 19. In contrast, 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 reliance on needed birth control. *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* http://www.regulations.gov. The IOM's Committee on Women's Health Research thus concluded that barriers to women's healthcare could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." IOM Rep. at 104 (quotation marks omitted).

This conclusion finds 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* 3 (Feb. 16, 2013), Oxford Handbook of Behav. Econ. & the Law (Eyal Zamir & Doron Teichman eds.) (forthcoming), http://ssrn.com/abstract=2220022. Indeed, studies demonstrate that removing even minor cost or logistical barriers can dramatically increase consumption. *See, e.g.,* Kristina Shampan'er & Dan Ariely, *Zero as a Special Price: The True Value of Free Products* (2007), http://bit.ly/1iy2eSp.[2]

---

[2] This dynamic holds true across goods and services. 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. *See* Shampan'er & Ariely, *supra*. 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

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 teen pregnancy dropped

---

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.

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 Accommodations heed this social-science data: they seek to eliminate barriers to contraceptive access by allowing women to receive coverage through their existing healthcare providers while, at the same time, ensuring that religiously affiliated entities are entitled to opt out of covering services they find objectionable. "Under the accommodation, the plaintiffs' female employees . . . face minimal logistical and administrative obstacles, because their employers' insurers [are] responsible for providing information and coverage." *Hobby Lobby*, 134 S. Ct. at 2782 (citations and quotation marks omitted).

Requiring women to seek contraceptives directly from the government, from a third-party provider as part of Title X, or as part of an entirely new plan on the exchange, *see* Pl. Br. at 47-48, would subject them to substantial logistical and administrative burdens, and thereby impede the government's goal. *Cf. Hobby Lobby*, 134 S. Ct. at 2783

("[L]eaving [plaintiffs'] employees to find individual plans on government-run exchanges or elsewhere[ ] . . . is [ ] scarcely what Congress contemplated.") (quotation marks omitted). And the *Hobby Lobby* Court chose to discount "the option of a new, government-funded program," 134 S. Ct. at 2781-82—an alternative Justice Kennedy described as "[protecting] one freedom . . . by creating incentives for additional government constraints." *Id.* at 2786 (Kennedy, J., concurring). Instead, the Court relied on the first Accommodation at issue here, "conclud[ing] that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Id.* at 2759; *see e.g.*, *id.* at 2760, 2763, 2781-82; *id.* at 2785-87 (Kennedy, J., concurring).

Although the least-restrictive-means test is demanding, 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); *accord Tabbaa v. Chertoff*, 509 F.3d 89, 105 (2d Cir. 2007); *Spratt v. Rhode Island Dep't of*

Corr., 482 F.3d 33, 41 n.11 (1st Cir. 2007); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir.1997). "[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). For all the above reasons, this Court should decline Plaintiff's invitation to second guess the judgment of the coordinate branches of the federal government.

C. The Accommodations are not under-inclusive.

To be sure, a regulation "cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). But a law must be "*substantially* underinclusive" to fail strict scrutiny. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 214 (3d Cir. 2004) (Alito, J.) (emphasis added). If there is a "qualitative or quantitative difference between the particular religious exemption requested [by Plaintiff] and other [ ] exceptions already tolerated, . . . [which] further[ ] distinct compelling

governmental concern[s]," a statute will still survive such review. *Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014).

Plaintiff points to three exceptions as undermining the government's claim of a pressing need for women to gain access to contraceptive coverage: (1) employers with fewer than fifty employees need not provide health insurance at all; (2) houses of worship are exempted from the contraceptive-coverage requirement; and (3) grandfathered employers are exempted from some coverage requirements, including the one pertaining to contraceptives. *See* Pl. Br. 9-11, 44-45. But none of these exceptions undercuts the compelling nature of the government's goals.

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, one that requires employers to furnish employees with health coverage or to pay a tax. *See* 26 U.S.C. 4980H(c)(2)(A). While small employers may decline to provide coverage without paying the tax, any coverage they do provide must include contraceptives. Thus the

regulations contemplate that small-business employees will have comprehensive coverage, either through their employer or through a plan purchased on an 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.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012); *Serbian Orthodox Diocese 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. Title VII of the Civil Rights Act of 1964 has a similar exemption for religious organizations, but courts nonetheless have had little difficulty concluding that "Title VII is an interest of the highest order." *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d

1164, 1169 (4th Cir. 1985); *accord Young v. Northern Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994); *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982).

Finally, "grandfathered plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date, 42 U.S.C. § 18011(a), (e)—can hardly be characterized as an "exception" to the health-insurance-coverage requirement, much less to the contraceptive mandate. 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." IRS, *Internal Revenue Bulletin: 2010-29*, 19 (Jul. 7, 2010), http://1.usa.gov/1jqAejD. The transitional process is not exclusive to contraceptives or even preventive care, but applies to a panoply of mandatory-coverage requirements. 42 U.S.C. § 18011(a). The number of grandfathered plans will dwindle to zero fairly rapidly, as older healthcare plans are updated and renewed. 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. *See Yellowbear*, 741 F.3d at 61. 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 students, persons over 26, persons engaged in agriculture, and 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 v. Comm'r*, 490 U.S. 680, 699-700 (1989), ("[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 *United States v. Lee*, 455 U.S. 252, 260 (1982)). Yet one would be hard pressed to find a scheme more riddled with "deductions and exemptions." *Id.* at 700.

Neither *Hobby Lobby* nor *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), is to the contrary. In *O Centro*, the Court found that the reasons given by the government for denying the exception sought in that case applied "in equal measure" to another exception already granted. *Id.* 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. Thus, in *Hobby Lobby*, the Court recognized that "[e]ven a compelling interest may be outweighed . . . by another even weightier consideration" without running afoul of strict scrutiny. 134 S. Ct. at 2780. Indeed, notwithstanding the various exceptions to the provision at issue in that case, Justice Kennedy's vote was "premise[d] o[n] the Court's . . . assumption that the HHS regulation [ ] furthers a legitimate and compelling interest." *Id.* at 2786. Here, as discussed

above, the relevant exceptions are qualitatively different and eminently distinguishable from the one that Plaintiff seeks.

In sum, the government legitimately concluded that the staggering number of unintended pregnancies 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 resulting regulatory framework satisfies strict scrutiny.

III. The Establishment Clause Forbids a Construction of RFRA that Calls for Plaintiff's Religious Interests to Override Employees' Ability to Obtain Contraceptive Coverage.

Privileging Plaintiff's religious considerations over its female employees' interests in gaining access to vital healthcare benefits—and granting Plaintiff veto power over the flow of those benefits from independent third parties—would, as applied in this case, place RFRA at odds with the Establishment Clause.

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

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 (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, 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. Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.18 (1989), the Court struck down a sales-tax exemption limited to religious periodicals in part because "it burden[ed] nonbeneficiaries by increasing their tax bills."

RFRA heeds this general principle. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court upheld RLUIPA—a statute that, like RFRA, applies 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 ensure an exemption is

"measured so that it does not override other significant interests." *Id.* at 722. Most recently, in *Hobby Lobby*, the Court reaffirmed that "in applying RFRA courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720).

In *Hobby Lobby*, the Court was able to strike a measured balance between the employers' religious interests in not furnishing contraceptive coverage, and the employees' compelling interests in obtaining the coverage, because "the means to reconcile those two priorities are at hand in the *existing accommodation* the Government has designed, identified, and used," referring to the first of the two Accommodations at issue here. *Id.* at 2787 (Kennedy, J., concurring) (emphasis added). Thus, the government had a viable, existing mechanism that would allow for the exemption to be granted without imposing "any detrimental effect on any third party." *Id.* at 2781 n.37 (majority opinion); *see also id.* at 2781-82.

The same cannot be said here. If the Accommodations are struck down, Plaintiff's employees will be left with no viable means to obtain insurance coverage for contraceptives.

> Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.

Hobby Lobby, 134 S. Ct. 2786-87 (Kennedy, J., concurring). The exemption that Plaintiff seeks would come at the expense of employees' access to important healthcare benefits, and thus conflicts with the Establishment Clause.

B. Plaintiff requests an unconstitutional veto over the regulatory obligations of third parties.

The relief that Plaintiff seeks is not an exemption, as that term is normally understood; it is a veto. The essence of Plaintiff'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)). Plaintiff'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 thus cannot be squared with the Establishment Clause.

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), or "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 on other grounds 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 Plaintiff 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 Plaintiff may refuse to pay for or arrange for certain benefits, *see Hobby Lobby*, 134 S. Ct. 2751, it cannot preclude the government from making those benefits available via third-party arrangements. *See Univ. of Notre Dame*, 743 F.3d at 555 (noting that the Accommodation confers rights and obligations on third parties, not on the exempt organization). Plaintiff seeks not only to exempt itself, but 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 that result.

Conclusion

The lower court's decision should be affirmed.

Respectfully Submitted,

/s/ *Ayesha N. Khan*
Ayesha N. Khan
Counsel of Record
1301 K Street, NW, Suite 850E
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW, Suite 850E
Washington, DC 20005
(202) 466-3234
khan@au.org

Counsel for Amici Curiae

October 3, 2014

Certificate of Compliance

This brief complies with Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft WordPerfect, Century Schoolbook, 14-point font. According to the word-count function and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 6,367 words.

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

Certificate of Service

On October 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.

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