Consolidated Case Nos. 13-2723 & 13-6640

In the United States Court of Appeals for the Sixth Circuit

Michigan Catholic Conference, *et al.*;
Catholic Diocese of Nashville, *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 Western District of Michigan (No. 13-cv-1247) (Quist, J.),
and the United States District Court
for the Middle District of Tennessee (No. 13-cv-1303) (Campbell, J.)

Unopposed Motion for Leave to File Brief of *Amici Curiae* Americans United for Separation of Church and State, American Civil Liberties Union Foundation, American Civil Liberties Union of Michigan, and American Civil Liberties Union of Tennessee

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Pursuant to Federal Rule of Appellate Procedure 29(b), Americans United for Separation of Church and State, American Civil Liberties Union Foundation, American Civil Liberties Union of Michigan, and American Civil Liberties Union of Tennessee respectfully submit this motion for leave to submit a brief—filed concurrently with this motion—as *amici curiae* in support of Defendants-Appellees.

The United States has consented to the filing of *amici*'s brief. Counsel for Plaintiffs, however, has declined either to consent, or to oppose, the filing.

Interest of *Amici*

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.*, Br. 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 come at the expense of innocent third parties.

The American Civil Liberties Union Foundation 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 Michigan** and **ACLU of Tennessee** are two 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.

Desirability of *Amici*'s Participation
and Relevance of Matters Asserted

The consolidated appeal before the Court is one of many related cases currently being litigated across the United States—*see, e.g.*, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013)—each raising the same or substantially the same issues as those currently before this Court.

Americans United represents three women who have intervened in one of these cases—*University of Notre Dame v. Sebelius*, __ F.3d __, No. 13-3853, 2014 WL 687134 (7th Cir. Feb. 21, 2014)—to defend the challenged regulations. These women are, to date, the only affected women participating as full parties in any of the various challenges to the Affordable Care Act's contraceptive regulations. As there will undoubtedly be women affected by the Court's decision in this case—Plaintiffs' insurance covers over eleven thousand individuals, Pls.' Br. at 15—granting this motion would allow the Court to hear the perspective of the unrepresented women who stand to benefit from the

contraceptive regulations challenged in this case. Participation of the ACLU, ACLU of Michigan, and ACLU of Tennessee would lend the Court the further benefit of the expertise of one of the country's foremost organizations engaged in striking a proper balance between religious exercise and women's civil liberties.

The accompanying brief develops lines of argument that are relevant to the case but distinct from the positions taken by the United States. The brief presents points of law and other information regarding, *inter alia*, Plaintiffs' ability to avoid religious injury by pursuing alternative means of ensuring employees' access to health insurance, social-science literature demonstrating that the challenged regulatory scheme accomplishes compelling governmental interests via the least restrictive means, and the significant Establishment Clause concerns that would be raised by granting the exemption that Plaintiffs seek. Because these arguments will be helpful to the Court in addressing the issues raised in this appeal, and would otherwise fail to receive due consideration, *amici* respectfully request leave to file the attached brief.

Respectfully submitted,

/s/ *Ayesha N. Khan*

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February 27, 2014

Certificate of Service

On February 27, 2014, I served a copy of this motion on all counsel of record through the Court's ECF system.

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

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Brief of *Amici Curiae* Americans United for Separation of Church and State, American Civil Liberties Union Foundation, American Civil Liberties Union of Michigan, and American Civil Liberties Union of Tennessee

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-2723/13-6640 Case Name: Mich. Catholic Conference v. Sebelius

Name of counsel: Ayesha N. Khan

Pursuant to 6th Cir. R. 26.1, Americans United for Separation of Church and State
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on February 27, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Ayesha N. Khan

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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Name of counsel: Ayesha N. Khan

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-2723/13-6640 Case Name: Mich. Catholic Conference v. Sebelius

Name of counsel: Ayesha N. Khan

Pursuant to 6th Cir. R. 26.1, American Civil Liberties Union of Tennessee
Name of Party
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Case Number: 13-2723/13-6640 Case Name: Mich. Catholic Conference v. Sebelius

Name of counsel: Ayesha N. Khan

Pursuant to 6th Cir. R. 26.1, American Civil Liberties Union of Michigan
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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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.*, Br. 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*, __ F.3d __, No. 13-3853, 2014 WL 687134, at *11-*12 (7th Cir. Feb. 21, 2014).

The **American Civil Liberties Union Foundation** 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 Michigan** and **ACLU of Tennessee** are two 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(b), a*mici* have concurrently filed a motion to file this brief. Furthermore, no party's counsel authored the 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.

Summary of Argument

Pursuant to regulations adopted by the Department of Health and Human Services ("HHS") under the Patient Protection and Affordable Care Act ("ACA"), group and individual health-insurance plans must provide women with insurance coverage for a range of preventive-care services, including contraception. 42 U.S.C. § 300gg-13a; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). A religious non-profit can exempt itself from this provision by certifying its objection to the contraceptive-coverage requirement; upon receiving such certification, the organization's insurance company—or in the case of self-insured plans, a third-party administrator—steps in to assume responsibility for providing the coverage. 78 Fed. Reg. 39,870, 39,873-74 (July 2, 2013).

Plaintiffs have challenged this Accommodation under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, 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." Plaintiffs claim that their religious exercise is substantially burdened by this arrangement because (1) submitting the certification form triggers the provision of services Plaintiffs find religiously objectionable, and (2) Plaintiffs must maintain a relationship with an insurer that provides those objectionable services. Pls.' Br. 27-29.

But Plaintiffs have failed to demonstrate that they are forced—or even pressured—to do anything that they find religiously objectionable because the ACA allows them to pay a tax in lieu of furnishing their employees with the insurance to which they object. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 98 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013). That tax—designed to defray the cost of employees' reliance on the public healthcare exchanges—amounts to far less than the cost of providing employer-based healthcare directly. And to the extent that discontinuing health-insurance coverage could place the Plaintiffs at a competitive disadvantage, nothing in the law would prevent them from furnishing employees with a subsidy to offset the cost of privately

purchased insurance. Being faced with a choice between direct provision of employee benefits and reliance on a system of public subsidization does not, as a matter of law, amount to a substantial burden.

No substantial burden would arise even if Plaintiffs were to maintain their insurance plans and avail themselves of the Accommodation. Plaintiffs' claim that a substantial burden exists in requiring them to put their objection in writing is both "paradoxical and virtually unprecedented." *Univ. of Notre Dame*, 2014 WL 687134, at *11. How else is their insurance provider to know of their objection? Plaintiffs have no more entitlement to be excused from voicing their objection than does any other conscientious objector. To the extent that Plaintiffs object to maintaining a relationship with entities that step in to provide the objectionable coverage, they are taking issue with actions of third parties—a scenario that, as a legal matter, does not impose a substantial burden, no matter how religiously injurious it may be.

Even if Plaintiffs' religious exercise were substantially burdened, any such burden would withstand strict scrutiny. The government

properly concluded that reducing barriers to women's access to contraceptive coverage is essential to vindicating the government's compelling interests in reducing unintended pregnancies and abortions, and in redressing gender inequality.

Furthermore, Plaintiffs' interpretation of RFRA cannot be squared with the Establishment Clause, which forbids recognition of religious exemptions that come at the expense of others. Plaintiffs' interpretation of RFRA would also effectively give Plaintiffs a religious veto over the flow of regulatory benefits to third parties, contrary to the holding of *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Pursuant to the canon of constitutional avoidance, such an interpretation of the statute must be avoided.

Background

A. The Regulations

Congress enacted the Patient Protection and Affordable Care 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"). Among other things, the Act requires employers with at least fifty employees either to provide minimally adequate health insurance to their employees—including coverage for preventive care—or pay a tax of $2,000 per employee (beyond the first thirty 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, HHS asked the Institute of Medicine ("IOM") to identify the preventive services necessary for women's health and well-being. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("IOM Report"), http://bit.ly/19XiWHK. Following an extensive survey of scientific literature and empirical data, IOM concluded that women have different health needs than men, and that these needs often generate additional costs. *See id.* at 18; *see also* 155 Cong. Rec. 29,070 (2009) ("Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.") (statement of Sen. Feinstein); Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*,

http://go.cms.gov/1iDkoSB ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). IOM found that the disproportionately high cost of preventive services for women combines with the historical disparity in earning power between the sexes to create "cost-related barriers to . . . medical tests and treatments and to filling prescriptions for themselves and their families." IOM Rep. at 18-19.

IOM found that "even moderate copayments for preventive services" create a significant deterrent for women who might otherwise avail themselves of such services. *Id.* at 19. Particularly in low-income populations, any cost-sharing requirements "pose barriers to care and result in reduced use of preventive and primary care services." *Id.* at 109. In particular, many of the most effective contraceptive methods carry a high up-front cost, which forecloses access for many women. *Id.* at 108. Indeed, barriers to preventive care "are so high that [women] avoid getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski).

Relatedly, IOM found that 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. Indeed, every year, one in twenty American women experiences an unintended pregnancy. *Id*. Forty-two percent of these women choose to have an abortion, *id*., while other women carry to term a child for which they may be unprepared. Among the latter group, some may be unaware of their pregnancy at first and unwittingly cause harm to themselves or to their fetus. *Id*. at 103.

IOM's Committee on Women's Health Research concluded that these problems could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." *Id*. at 104 (quotation marks omitted). The Report noted that when costs for contraception are reduced or eliminated altogether, women are more likely to rely on more effective methods. *Id*. at 109. It further noted that making contraceptives widely available could have additional benefits such as, for example, lowering the risk of certain kinds of cancer and other diseases for many women. *Id*. at 107. In light of these findings, IOM ultimately recommended including "the full range of

[FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" as part of required preventive-services coverage without cost-sharing. *Id*. at 10-12. The Health Resources and Services Administration ultimately adopted guidelines consistent with IOM's recommendations. *See* 77 Fed. Reg. 8725.

B. The Accommodation

Before finalizing the regulations and after extensive comment, HHS sought to accommodate the objections of religious organizations. HHS exempted houses of worship from the contraceptive-coverage 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. at 39,874. Other religious non-profit organizations were given the ability to opt out of providing contraceptive coverage by notifying their insurance administrator or provider of their religious objection. *See id*. at 39,873-74. The

regulations require that, upon receipt of such notification, the administrator or provider is to assume the task of offering contraceptive coverage to the organization's employees at no cost to the organization. *Id*.

C. Proceedings Below

Plaintiffs Michigan Catholic Conference, Catholic Diocese of Nashville, and St. Cecelia Congregation are religious organizations that qualify as houses of worship under the challenged regulations; they are altogether exempt from any requirement to provide contraceptive coverage. Pls.' Br. 14. The remaining Plaintiffs are religious non-profits that can avail themselves of the Accommodation.

Plaintiffs challenged this regime in two lawsuits—one brought in Tennessee, the other in Michigan—that have now been consolidated on appeal. In both cases, Plaintiffs moved for and were denied a preliminary injunction. The Tennessee court concluded that Plaintiffs' "inability to prevent others from acting in contravention of [their] religious beliefs does not constitute a substantial burden on those beliefs." Op., CDN-R.65, Page ID #1347. Likewise, the Michigan court

held that the Accommodation does not require Plaintiffs to materially alter their behavior and imposes obligations only on third parties. Op., MCC-R.40, Page ID #1340. The Michigan district-court judge likened Plaintiffs' position to that of a juror excused from sitting on a capital case for religious reasons, who then claims a religious right to prevent the trial altogether. *Id*. at Page ID #1339.

ARGUMENT

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

The centerpiece of Plaintiffs' suits is their claim that the challenged regulations violate RFRA, under which the Government cannot "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.[1] In order to make out a RFRA claim, Plaintiffs bear the burden of demonstrating that the challenged regulations substantially burden their religious exercise.

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[1] Plaintiffs brought other claims as well (*see* Pls.' Br. 52-68), but this brief addresses only the RFRA claim. *Amici* support the United States' arguments on the balance of Plaintiffs' claims.

Autocam Corp. v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013).

Demonstrating such a burden is "a difficult threshold to cross." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007). Plaintiffs have failed to make the required showing for two independent reasons. First, they can discontinue their health-insurance plans and avoid religious injury altogether. Second, the Accommodation imposes no legally cognizable burden.

A. The law permits Plaintiffs to avoid any religious injury by relying on the Affordable Care Act's system of publicly subsidized healthcare.

To demonstrate a substantial burden, Plaintiffs must show that the challenged regulations "force[ ] them to do what their religion tells them . . . not [to] do." *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013); *see also* Pls.' Br. at 30, 41. "[T]he critical element [is] compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of [an adherent's] religion." *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir. 1987). The compulsion may be accomplished by threat of criminal sanction, deprivation of vital governmental benefits, or other

"enormous pressure . . . to violate [one's] religious beliefs." *Korte,* 735 F.3d at 683. Thus, 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).

In contrast, 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").

In a similar vein, when a challenged regime offers an adherent a viable alternative means to satisfy his religious obligation—even one that is less convenient or otherwise inferior—no substantial burden exists. *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); *Coleman v. Governor of Mich.*, 413 F. App'x 866, 876 (6th Cir. 2011) (no substantial burden when government cuts off one means of religious observance while leaving alternative means available); *Watkins v. Shabazz*, 180 F. App'x 773 (9th Cir. 2006) (prisoner's right to religious diet not substantially burdened by unavailability of compliant meals, where prisoner could

eat meat substitute or find outside organization to provide *halal* meat); *Patel v. United States*, 515 F.3d 807 (8th Cir. 2008) (no substantial burden from lack of *halal* meals where prisoner may purchase religiously unobjectionable food at own expense from commissary).

This Court has relied on these principles in interpreting the "substantial burden" requirement shared by RFRA and its progeny, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). In *Living Water*, 258 F. App'x at 739, this Court framed the substantial-burden inquiry as follows: "although the government action may make [an adherent's] religious exercise more expensive or difficult, does that government action place substantial pressure on [the adherent] to violate its religious beliefs or effectively bar [it] from. . . the exercise of its religion?" Because the plaintiff in that case failed to demonstrate that "it [could not] carry out its church missions and ministries . . . . [but] only that it [could not] operate [in the manner] it desire[d]," it had not demonstrated a substantial burden on its religious exercise. *Id*. at 741.

Plaintiffs have failed to demonstrate that the challenged

regulations "effectively bar" them from maintaining compliance with their religious principles. *Id.* at 739. Although they present their choice as one between "violat[ing] their religious beliefs or pay[ing] crippling fines," Pls.' Br. at 32, Plaintiffs' financial exposure is far from "crippling," nor may it accurately be characterized as a "fine." Rather, Plaintiffs may discontinue their health-insurance plans 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 the 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 thirty

employees) per year. *Id.*[2]

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

Moreover, the tax is triggered only when necessary to offset the cost of publicly subsidizing health insurance, and the amount is manifestly "proportionate rather than punitive." *Liberty Univ.*, 733 F.3d at 98. Indeed, the assessable payment amounts to less than half the average per-employee cost of employer-provided healthcare in Michigan ($4,306) and Tennessee ($4,026). The Henry J. Kaiser Family Foundation, *Average Single Premium per Enrolled Employee for*

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[2] Some of the Plaintiffs could discontinue their health coverage without paying even this, as they appear to have fewer than 50 employees. *See* Camp Marymount Staff, http://bit.ly/1ms9luA (last visited Feb. 27, 2014); St. Mary's Villa Child Development Center, *Parent Handbook* 3, *available at* http://bit.ly/1mDeMKM.

Employer-Based Health Insurance, http://bit.ly/1eVfSK6. Thus, because the tax is paid instead of healthcare-insurance premiums, choosing to pay the tax would actually accrue to Plaintiffs' financial benefit. As *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 (emphasis added).[3]

Many view the latter option as preferable—as was recently recognized by 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 (last visited Feb. 27, 2014). Indeed, under the new regulatory regime—which makes

[3] The Plaintiffs would have no valid RFRA objection to the payment of the $2,000 tax, as the Supreme Court has repeatedly rejected challenges to general taxation schemes. *See, e.g., United States v. Lee*, 455 U.S. 252, 257 (1982); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Jimmy Swaggart Ministries,* 493 U.S. at 391.

insurance coverage affordable for all individuals, irrespective of age, income, or medical condition—discontinuing health insurance has become a more feasible alternative for many employers.

Plaintiffs' brief includes a glancing allusion to "ruinous practical consequences" that would arise if they were to discontinue their insurance coverage, citing two affidavits for support. Pls.' Br. 32. But neither of the cited affidavits specifically contends with the $2,000 tax. *See* Robinson Decl., CDN-R.16, Page ID #323; Long Decl. MCC-R.11-3, Page ID #420. The affidavits also do not indicate that Plaintiffs would be unable to mitigate any financial or practical consequences by supplementing their employees' salaries or providing a health-insurance stipend to aid the employees' purchase of health insurance on the exchanges. At best, these affidavits support the proposition that Plaintiffs' religious practice may be made marginally more "expensive or difficult," *Living Water*, 258 F. App'x at 739; they hardly sustain the Plaintiffs' burden of demonstrating that their "legal and religious obligations are incompatible," *Korte*, 735 F.3d at 685.

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 a wider range of coverage choices, to reduce costs, to minimize paperwork, or to maintain their religious scruples. As in *Braunfeld*, there is no reason that Plaintiffs should be spared this choice, simply because religion is part of their business calculus.

B. Complying with the Accommodation would not impose a substantial burden on Plaintiffs' religious exercise.

Even if Plaintiffs were somehow required to retain their medical-insurance plans and, hence, to avail themselves of the Accommodation, their religious exercise would still not be substantially burdened. A burden is not substantial under RFRA simply because a litigant says so; "substantiality . . . is for the court to decide." *Univ. of Notre Dame*, 2014 WL 687134 at *11. Thus, in *Mozert*, this Court held that the plaintiffs' claim that their "religious beliefs compel[led] them to refrain from exposure to" objectionable public-school materials did not mean

that the forced exposure imposed a substantial burden as a matter of law. 827 F.2d at 1062.

Demonstrating a substantial burden is and must be "a difficult threshold to cross." *Living Water*, 258 F. App'x at 736. 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). Even if a plaintiff's beliefs "are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996). "Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from . . . restrictions of any kind." *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

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." *Univ. of Notre Dame*, 2014 WL 687134 at *11. Indeed, Plaintiffs' counsel at oral argument in the Notre Dame case—the same individual who represents the Plaintiffs here—could not think of a single instance in which an exemption itself has been found to substantially burden religious practice. Oral Argument at 27:40, *Univ. of Notre Dame*, 2014 WL 687134, *available at* http://1.usa.gov/1faPzU4.

The Accommodation permits Plaintiffs "to do what [they have] always done" by notifying their third-party administrator of their religious objection and subsequently refusing to provide contraceptive coverage. Op., MCC-R.40, Page ID #1340. They provided that notification before they filed this lawsuit, and they will do so after this lawsuit even if they were to prevail. The only thing that changed with the passage of the ACA is that their insurance companies, or third-party administrators, will now step in to provide the contraceptive coverage that otherwise would have been unavailable to the Plaintiffs' employees.

Plaintiffs claim that this change makes all the difference because,

formerly, their objection had the effect of making the coverage unavailable, whereas now, the objection "enables a third party to provide the very coverage to which Appellants object." Pls.' Br. 38. 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*, 2014 WL 687134 at *9 (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 objectors from themselves providing the objectionable services.

No matter how sincere Plaintiffs' religious objection to

contraceptives may be, Plaintiffs' "inability to prevent others from acting in contravention of [their] religious beliefs does not constitute a substantial burden on those beliefs." Mem., CDN-R.65, Page ID #1347. 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, 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.

Recasting the objection as opposition to maintaining a relationship with the objectionable activity does not change the result. The *Bowen* plaintiffs were likewise required to maintain a relationship with the social-security office, for failing to do so would mean the loss of life-sustaining benefits. As this Court held in *Mozert*, compulsion to witness religiously objectionable activity is legally (even if not religiously) distinct from being forced to engage in that activity oneself. 827 F.2d at 1070.

As a district-court judge observed in parallel litigation, 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). Plaintiffs are not being asked to carpool with a bank-robber; after the Plaintiffs decline, others swing by to give him a lift. *Cf.* Pls.' Br. 43. Likewise, Plaintiffs never hands a knife to any neighbor, whether murderous or not; when they refuse the blade, Congress and others accomplish the deed. *Cf. id.* at 44.

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

Even if the regulations burdened Plaintiffs' religion, they would be justified by a compelling interest pursued by the least restrictive means. Plaintiffs do not contest the government's interest in ensuring

the health and welfare of women, or in redressing gender inequalities—nor could they, given the longstanding recognition of the compelling nature of these interests. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944)*; Roberts v. U.S. Jaycees,* 468 U.S. 609, 626 (1984). Rather Plaintiffs primarily take issue with what they view as exceptions to the regulations, as well as the Government's chosen means for vindicating its interest. *See* Pls.' Br. at 46-51. While the United States correctly points out the flaws in Plaintiffs' arguments, *see* US Br. at 36-46, more remains to be said about why the regulations are, in fact, the least restrictive means to vindicate the government's compelling interests.

The government adopted the regulations at issue after accepting thousands of comments, many of which stressed the importance of the reduction of barriers to contraceptive access. *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. Myriad social-science studies demonstrate that even exceedingly low

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

Study after study confirms this dynamic. For example, removing a cost barrier—even one that is exceedingly minor—has been shown to dramatically increase consumption. *See* Kristina Shampan'er & Dan Ariely, *Zero as a Special Price: The True Value of Free Products*, http://bit.ly/1iy2eSp. When Amazon.com inadvertently imposed a ten-cent shipping price for goods sent to one European country, while

dropping the shipping price to zero for other countries, it watched sales soar in the latter context and remain largely unchanged in the former. *Id.* at 40.

Cost barriers are by no means the only kind of hurdles that will deter use. Moving a bowl of fruit 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). 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 fail to make any contributions in the absence of an enrollment-by-default rule. Brigite 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.

Studies show that women's use of contraception reflects the same phenomena. One study showed that when condom prices rise from 0 to

a mere 25 cents, sales decline by 98%. 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 (1999), http://1.usa.gov/1b1Q1gV. The same result holds when the barrier takes the form of inconvenience rather than cost. For example, in another study, making oral contraceptives only slightly less convenient—dispensing them every three months rather than providing an annual supply—resulted in a 30% greater chance of unintended pregnancy, and a 46% greater chance of obtaining an abortion. Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 Obstetrics & Gynecology 566 (2011), http://bit.ly/1ebyZRQ.

The results are greatest when both cost and convenience-related barriers are removed. Studies have shown that making the most convenient forms of contraception—those requiring the least effort to maintain—available at no cost to young women results in a staggering 80% drop in the rate of unintended pregnancy, leading researchers to predict that the regulations before the Court could "prevent[ ] as many

as 41-71% of abortions performed annually in the United States." Sarah Kliff, *Free Contraceptives Reduce Abortions, Unintended Pregnancies. Full Stop.*, Wash. Post, Oct. 5, 2012, http://wapo.st/1ideMhQ.

The Accommodation heeds this social-science data; it permits religiously affiliated entities to opt out of providing health insurance for services that they find objectionable without balkanizing women's access to contraceptives. The regulations place the burden of arranging contraceptive coverage on insurance providers, and allow women to receive healthcare benefits through entities with whom they have a pre-existing relationship. In contrast, all of the alternatives suggested by the Plaintiffs (*see* Pls.' Br. 50-51) would require women to seek some health services from one source and other services from another, thereby introducing convenience, cost, and knowledge-related barriers that would necessarily diminish women's access to contraceptive services and impede the government's goals.

The fit between the means employed, and the ends to be accomplished, by the regulatory regime is more than adequate to satisfy the least-restrictive-means test. The government is not

"require[d] . . . to prove a negative—that no matter how long one were to sit and think about the question, one could never come up with an alternative regulation that adequately serves the compelling interest while imposing a lesser burden on religion." *United States v. Wilgus*, 638 F.3d 1274, 1288 (10th Cir. 2011). "[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) (discussing RLUIPA) (internal quotations omitted). "Not requiring the government to do the impossible—refute each and every conceivable alternative regulation scheme—ensures that scrutiny of federal laws under RFRA is not 'strict in theory, but fatal in fact.'" *Wilgus*, 638 F.3d at 1289 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring)).

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

As this Court recognized in *Living Water*, 258 F. App'x at 741 n.6,

statutory accommodations of religion, like RFRA and RLUIPA, are subject to Establishment Clause constraints. 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." *Id.* at 709. Instead, the statute impermissibly bestowed the "right to insist that in pursuit of [one's] own interests others must conform their conduct to [one's] own

religious necessities." *Id.* at 710 (quotation omitted). Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.), the Court struck down a sales-tax exemption limited to religious periodicals in part because "it burden[ed] nonbeneficiaries by increasing their tax bills."

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

The Supreme Court's free-exercise jurisprudence reflects these same considerations. In *Lee*, 455 U.S. at 253, the Court rejected an Amish employer's request for a religious exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." And in *Braunfeld*, 366

U.S. at 608-09, the Court refused to recognize an exemption to the Sunday closing law because that would have "provide[d] [the plaintiffs] with an economic advantage over their competitors who must remain closed on that day." 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."[4]

Plaintiffs urge an interpretation of RFRA that "override[s] other significant interests." *Cutter*, 544 U.S. at 722. For women who otherwise cannot afford effective contraceptives, the regulations at

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[4] To the extent the Court has ever approved religious exemptions that potentially harm third parties, it has done so only when necessary to preserve 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.

issue in this case provide a lifeline to greater security in their bodies and futures—personal autonomy interests that lie "[a]t the heart of liberty." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). HHS adopted the challenged regulations because of women's compelling need for these services. *See* US Br. at 38-40. Indeed, the regulations are meant to address a public-health crisis affecting millions of women every year. *See supra*, pp. 7-10. Granting Plaintiffs the relief they seek would have widespread deleterious effects, for Plaintiffs' insurance plans cover more than eleven thousand individuals. Pls.' Br. at 15.

The interpretation of RFRA urged by Plaintiffs is anything but "measured." *Cutter*, 544 U.S. at 722. Not only does it overlook the interests of thousands of women, it entails an exceedingly hands-off approach to the substantial-burden analysis. *See* Pls.' Br. at 33-37. This anemic substantial burden will carry the day if a litigant can contrive any hypothetical means of accomplishing the government's goal—even one that is politically infeasible, administratively cumbersome, or considerably less effective. *Id.* at 50-51. Short of employing an

extraordinarily unimaginative lawyer, it's not clear how a claimant can possibly lose under this analysis. Under Plaintiffs' view, they should be allowed, simply by raising their hands, to deprive women of access to a governmental benefit that has been deemed essential to their wellbeing. That result cannot be squared with the Establishment Clause.

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

The relief that the Plaintiffs seek is not an exemption, as that term is normally understood; rather, it is a veto. As Judge Quist explained, Plaintiffs seek to "block a third party from providing their employees with contraceptive coverage." Op., MCC-R.40, Page ID #1342. Plaintiffs' claim that RFRA entitles them to this outcome cannot be reconciled with *Larkin*, 459 U.S. 116, 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.

The interpretation of RFRA urged by Plaintiffs is similarly infirm. Determining who receives regulatory benefits is undeniably a "power ordinarily vested in agencies of government." *Id.* at 122. While Plaintiffs are free to refuse to receive or provide such benefits themselves, they seek to preclude the government from stepping in to make the benefits available via third-party arrangements. Plaintiffs seek not only to exempt themselves, but to redefine the regulatory relationship between affected women, insurers, and the government. And they seek to do so for reasons that are admittedly not "religiously neutral." *Id.* at 125. The Constitution precludes Plaintiffs from deciding whether affected women will obtain contraceptive benefits, just as it precludes churches from determining which establishments obtain liquor licenses.

Privileging the University's religious interests over the interests of literally thousands of women in actually receiving contraceptive coverage—and giving Plaintiffs veto power over the flow of such benefits from independent third parties—would, as applied in this case, 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); *accord Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."). 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 courts' decisions.

Respectfully submitted,

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February 27, 2014

Certificate of Compliance

This brief was prepared in 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 6,909 words.

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Certificate of Service

On February 27, 2014, I served a copy of this brief of *amici curiae* on all counsel of record through the Court's ECF system.

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Designation of Relevant District Court Documents

Michigan Catholic Conference v. Sebelius, No. 13-cv-1247 (W.D. Mich.):

Record Entry	Page ID# Range	Description
R.11-3	414-422	Declaration of Paul A. Long
R.40	1329-50	Opinion

Catholic Diocese of Nashville v. Sebelius, No. 13-cv-1303 (M.D. Tenn.):

Record Entry	Page ID# Range	Description
R.16	318-324	Declaration of Terry Robinson
R.65	1339-1358	Memorandum