Case Nos. 13-3536, 14-1374, 14-1376 & 14-1377

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**In the United States Court of Appeals for the Third Circuit**

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Geneva College, *et al.*;
Most Reverend Lawrence T. Persico, *et al.*;
Most Reverend David A. Zubik, *et al.*,
*Plaintiffs-Appellees*

v.

Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
*Defendants-Appellants*

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On Appeal from the United States District Court
for the Western District of Pennsylvania,
Judge Joy Flowers Conti, No. 12-0207,
and Judge Arthur J. Schwab, Nos. 13-0303 & 13-1459

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# Brief of *Amicus Curiae* Americans United for Separation of Church and State in Support of Defendants-Appellants and Reversal

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## Identity and Interest of *Amicus 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) (No. 03-9877), 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 three women who have

intervened in a parallel case in defense of the regulations now before the Court. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558-59 (7th Cir. 2014).

In accordance with Federal Rule of Appellate Procedure 29(c)(5), a*micus* states that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amicus*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission. Counsel for the United States and Geneva College consented to the filing of this brief, but counsel for the *Zubik* and *Persico* Plaintiffs-Appellees declined to consent or oppose. Accordingly, *amicus* has contemporaneously submitted a motion for leave to file per Federal Rule of Appellate Procedure 29(a).

## 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) ("NFIB"). The Act requires employers with at least

50 employees either to provide minimally adequate health insurance to their employees, including coverage for preventive care without cost-sharing, or to pay a tax of $2,000 per employee (after the first 30 employees) to defray the cost of public subsidization of the employees' healthcare. *See* 26 U.S.C. § 4980H(a)-(d).

To aid in development of the preventive-care requirement, the U.S. Department of Health and Human Services ("HHS") asked the Institute of Medicine ("IOM"), the nonpartisan "health arm of the National Academy of Sciences," to identify the medical services necessary for women's health and well-being. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("IOM Rep."), http://bit.ly/19XiWHK; *About the IOM*, http://www.iom.edu/About-IOM.aspx.[1] After extensive study, the IOM recommended that coverage be provided for, among other things, all forms of FDA-approved contraceptives. IOM Rep. at 109-10. The federal government adopted that recommendation, thereby requiring contraceptives to be included

[1] All websites cited in this brief were last visited on June 17, 2014.

among the battery of preventive services that health plans must cover. *See* 42 U.S.C. § 300gg-13a; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

Before finalizing the regulations and after extensive comment, HHS sought to accommodate religious organizations' objection to the contraception-coverage requirement. HHS exempted houses of worship from the requirement upon finding that they "are more likely than other employers to employ people of the same faith who share the same objection" and their employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Other religious non-profit organizations were given an Accommodation that allows them to opt out of providing contraceptive coverage by certifying their religious objection to their insurance administrator or provider. *See id*. at 39,873-74. When an eligible organization opts out, its administrator or provider must assume responsibility for offering contraceptive coverage to the organization's employees at no cost to the organization. *Id*. at 39,876; *see also* 29 C.F.R. §§ 2590.715-2713A(b)(1), (b)(2)(i)-(iii), (c)(2). Plaintiffs challenge this arrangement 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.[2]

Plaintiffs are five eligible non-profit institutions ("the Non-Profit Plaintiffs"), two Dioceses ("the Diocesan Plaintiffs"), and two Bishops. The five Non-Profit Plaintiffs offer their employees and students health insurance either through self-insured plans administered by third-party administrators in the case of the *Zubik* and *Persico* Non-Profit Plaintiffs, or through fully insured plans in the case of Geneva College. *See* US Br. at 10-11. The Non-Profit Plaintiffs argue that the Accommodation's requirement that they submit a form to exempt themselves from the obligation to provide contraceptive-coverage forces them to "trigger" provision of that coverage to their employees and students by third parties, and that this result substantially burdens their religious exercise. *See, e.g.*, *Zubik* Compl. (Doc. No. 1) ¶¶ 112, 115;

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[2] Plaintiffs also raised claims under the United States Constitution and the Administrative Procedures Act, but the lower courts ruled for Plaintiffs on the basis of RFRA alone.

*Zubik* Mem. in Supp. of Prelim. Inj. (Doc. No. 6) at 7; *Persico* Compl. (Doc. No. 1) ¶ 101; *Geneva College* Compl. (Doc. No. 98) ¶¶ 139, 159.

The Diocesan Plaintiffs are not subject to the challenged regulations, but maintain trusts that fund self-insured health plans in which other institutions—including the four *Zubik* and *Persico* Non-Profit Plaintiffs—participate. *See Zubik* Compl. (Doc. No. 1) ¶¶ 35, 37, 38, 45; *Persico* Compl. (Doc. No. 1) ¶¶ 36, 37, 44, 51, 63. The Diocesan Plaintiffs claim that the Accommodation substantially burdens their religious exercise because they must either disassociate the Non-Profit Plaintiffs from the trusts or permit their trusts to "facilitate" the "triggering" of contraceptive insurance. *See, e.g.*, *Zubik* Compl. (Doc. No. 1) ¶¶ 130, 131; *Persico* Compl. (Doc. No. 1) ¶ 118; JA120-21.

The Bishops argue that the Accommodation substantially burdens their religious exercise by virtue of their duties in regard to the Dioceses' health-insurance trusts; they maintain they are forced to "facilitate" the "facilitation" of the "triggering" of contraceptive coverage. *See, e.g.*, *Zubik* Compl. (Doc. No. 1) ¶¶ 46, 47; *Persico* Compl. (Doc. No. 1) ¶ 105.

In an opinion addressing both the *Zubik* and *Persico* Plaintiffs, the district court held that the Accommodation's "triggering" of contraceptive coverage substantially burdened the religious exercise of four of the Non-Profit Plaintiffs, and that "facilitating" that result substantially burdened the religious exercise of the Diocesan Plaintiffs and Bishops. JA119-21. In separate opinions, the *Geneva College* court held that the Accommodation's "triggering" of contraceptive coverage substantially burdened Plaintiff Geneva College's religious exercise as to both its student and employee insurance. JA27-28, 62. Both lower courts concluded that the Accommodation cannot satisfy strict scrutiny. JA28-31, 63, 121-28.

## Argument

The centerpiece of Plaintiffs' lawsuit is a claim that the Accommodation violates RFRA. In order to make out a RFRA claim, Plaintiffs are charged with making a prima facie showing that the challenged regulations substantially burden their religious exercise. *Washington v. Klem*, 497 F.3d 272, 277-78 (3d Cir. 2007).

Plaintiffs have failed to make such a showing. First, the law allows Plaintiffs to avoid the Accommodation altogether. Under the

ACA, the Non-Profit Plaintiffs may discontinue their health coverage and pay a tax that amounts to a fraction of the cost of employer-provided healthcare, *see Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 98 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013), thus rendering their employees eligible for public health-insurance subsidies. Because the Non-Profit Plaintiffs then would not "trigger" contraceptive insurance for their employees, the Diocesan Plaintiffs and Bishops would likewise have no reason to fear "facilitating" that coverage. And to the extent Plaintiffs feel religiously compelled to provide for the welfare of the Non-Profit Plaintiffs' employees, nothing prevents Plaintiffs from doing so by means other than direct provision of health insurance.

Even if the Non-Profit Plaintiffs were somehow forced to maintain their health insurance on the Diocesan plans, no substantial burden would result. As both the Seventh and Sixth Circuits have recently observed, a non-profit's religious exercise is not burdened by the requirement that it affirmatively opt out of obligations to which it objects, nor by the government's subsequent decision to impose those obligations on third parties. *See Univ. of Notre Dame*, 743 F.3d at 557-

58; *Mich. Catholic Conf. v. Burwell*, __ F.3d __, No. 13-2723, 2014 WL 2596753, at *12 (6th Cir. June 11, 2014).

Furthermore, if a substantial burden did result, it would be justified by compelling interests in applying the challenged regulations to the Non-Profit Plaintiffs: providing the Non-Profit Plaintiffs' employees and students with access to a benefit essential to their well-being, reducing unintended pregnancies and, in turn, reducing the need for abortions, ensuring that female employees do not face substantially higher costs than their male counterparts in meeting healthcare needs, and ensuring women's ability to participate equally in society by deciding whether and when to become parents. In light of social-science data demonstrating that logistical and cost barriers would impede women's access to contraceptives, relying on women's existing healthcare providers to provide coverage for those contraceptives constitutes the least restrictive means to accomplish the government's goals.

Finally, Plaintiffs' interpretation of RFRA would exceed Establishment Clause limitations by overriding significant third-party

interests, and by granting 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.

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

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

To demonstrate a substantial burden, Plaintiffs must show that the challenged regulations (1) "force[ ] [them] to choose between following the precepts of their religion" and forfeiting governmental benefits, or (2) otherwise substantially pressure them to "modify [their] behavior and to violate [their] beliefs." *Klem*, 497 F.3d at 280. A paradigmatic substantial burden arises when individuals are "compelled to choose between their livelihoods and their faith," *Korte v. Sebelius*, 735 F.3d 654, 679 (2013), 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" when a law's financial impact 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 government's action "will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets"); *cf. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007) (no burden on religion

when regulation does not impose "restriction on . . . religious exercise" but rather "simple economic inconvenience").

Similarly, when the law leaves an adherent with viable alternative means of satisfying his or her religious obligation—even if relatively inconvenient or otherwise inferior—no substantial burden results. *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); *Kretchmar v. Beard*, 241 F. App'x 863, 865 (3d Cir. 2007) (inferior quality of religiously compliant meal option at prison not a substantial burden on religious exercise); *Garraway v. Lappin*, 490 F. App'x 440, 446 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 876 (2013) (no substantial burden results from prison policy curtailing access to books including religious texts where restricted access to religious materials did not prevent plaintiff from satisfying religious obligations).

The Non-Profit Plaintiffs contend that they are forced to maintain compliant health-insurance plans on pain of "crippling fines." *See, e.g.*,

*Zubik* Compl. (Doc. No. 1) ¶¶ 114, 149; *Zubik* Mem. in Supp. of Prelim. Inj. (Doc. No. 6) at 8, 22; *Persico* Compl. (Doc. No. 1) ¶¶ 103, 137; *see also Geneva College* Compl. (Doc. No. 98) ¶¶ 183, 209. In fact, the Non-Profit Plaintiffs may discontinue their health-insurance plans—and thereby trigger publicly subsidized insurance for their employees—by paying a *tax* amounting to a mere fraction of the cost of employer-provided health insurance. This would obviate not only the Non-Profit Plaintiffs' concern that they will "trigger" contraceptive coverage, but also the Diocesan Plaintiffs and Bishops' concern that they will "facilitate" the same.

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

amounting to $2,000 per employee (discounting the first 30 employees) per year. *Id.*[3]

This payment is a tax, both in name, *see id.* § 4980H(c)(7), and substance. As the Fourth Circuit recently observed in *Liberty University*, 733 F.3d at 96, the assessable payments generate governmental revenue, and so present the essential feature of a tax. Furthermore, the payments lack any requirement of scienter, are collected by the IRS like any other tax, and carry no additional legal consequences for the payer. *Id.* at 96-98. Moreover, the payment is triggered only when necessary to offset the cost of publicly subsidizing health insurance, and the amount is manifestly "proportionate rather than punitive." *Id.* at 98. These characteristics confirm that the assessable payment is a tax paid to comply with the law, *see NFIB*, 132 S. Ct. at 2595-97, rather than a fine assessed for violating it like the criminal penalty at issue in *Yoder*, 406 U.S. at 218.

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[3] It appears that Plaintiffs St. Martin Center and Prince of Peace Center have fewer than 50 full-time employees, and so could discontinue their plans without having to pay the tax. *See* St. Martin Center, *Contact Us*, http://bit.ly/1kr3Ygg; Prince of Peace Center, *Prince of Peace Center Staff*, http://bit.ly/1n5D0Le.

Accordingly, *Liberty University* observed that 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.[4] Indeed, many view the latter option as preferable, as has been observed 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* Global Markets Intelligence, *The Affordable Care Act Could Shift Health Care Benefit Responsibility Away from Employers, Potentially Saving S&P 500 Companies $700 Billion*, Market Intellect from Global Markets Intelligence, May 1, 2014, *available at* http://bit.ly/1s1jSOi. Because the new healthcare law makes health insurance available at affordable and subsidized rates, irrespective of age, income, or medical condition, discontinuing health

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

insurance does not carry the negative consequences for employees that it might otherwise.

And choosing to pay the tax instead of healthcare premiums would likely *save* Plaintiffs money, because the $2,000 assessable payment amounts to less than half the average annual per-employee cost of employer-provided healthcare in Pennsylvania ($4,323). Henry J. Kaiser Family Found., *Average Single Premium per Enrolled Employee for Employer-Based Health Insurance* (2012), http://bit.ly/1eVfSK6. To the extent that the Non-Profit Plaintiffs fear a competitive disadvantage from discontinuing their health-insurance plans, there is no reason why Plaintiffs could not pass on their savings to their employees in the form of higher wages or a healthcare stipend to aid their employees in obtaining health insurance on a public exchange.

Plaintiffs address this possibility first by eliding the difference between the $2,000 tax and the much greater financial exposure associated with providing a non-compliant health plan, referring to both as untenable "penalties" of differing amounts. *See*, *e.g,* JA383

(Decl. of Susan Rauscher). But the difference is one of kind rather than degree; the $2,000 tax is the "pay" option in the ACA's "pay or play" scheme, *see* Cohen, *supra*, and is more affordable than directly providing insurance by design, *see Liberty Univ.*,733 F.3d at 98.

Plaintiffs go on to argue that failure to offer a health plan could put the Non-Profit Plaintiffs at a competitive disadvantage in recruiting and retaining employees and students. *See, e.g.*, *Zubik* Compl. (Doc. No. 1) ¶ 186; *Geneva College* Compl. (Doc. No. 98) ¶ 187; *Geneva College* Mem. in Supp. of Second Mot. for Prelim. Inj. (Doc. No. 106) at 7. Plaintiffs support their position with conclusory allegations that fail to state a claim "above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Non-Profit Plaintiffs do not explain why they are unable to mitigate any disadvantage by passing on their potential savings to their employees in the form of higher wages or a healthcare stipend. More importantly, Plaintiffs fail to explain how any competitive disadvantage would do anything more than make their operations more expensive—a consequence that does not rise to a "constitutionally significant" level. *Jimmy Swaggart*

*Ministries*, 493 U.S. at 392.[5] The law simply does not insulate religious businesses from ever the need to make "some financial sacrifice in order to observe their religious beliefs." *Braunfeld*, 366 U.S. at 606.

Finally, the Non-Profit Plaintiffs mention in passing that they are religiously compelled to further the well-being of their employees, and that they do so by providing health insurance. *See, e.g., Geneva College* Compl. (Doc. No. 98) ¶ 183. But these Plaintiffs are free to further the well-being of their employees through alternative means, such as higher wages or a healthcare stipend. RFRA does not entitle Plaintiffs to satisfy their religious needs in whatever manner they find most convenient or desirable. *Cf. Kretchmar*, 241 F. App'x at 865 (3d Cir. 2007) (plaintiff prisoner's religious exercise not substantially burdened by prison's provision of religiously compliant diet that plaintiff

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[5] The same can be said of Plaintiffs' unsupported claim that donors may be less likely to fund the Non-Profit Plaintiffs if they choose to pay the tax rather than provide health insurance directly, *see*, *e.g,* JA384 (Decl. of Susan Rauscher), as well as the Diocesan Plaintiffs' claims that they are unable to prevent the Non-Profit Plaintiffs from participating in their health-insurance trust because this "would decrease the pooled financial resources" available for health insurance and so increase its cost, *Zubik* Compl. (Doc. No. 1) ¶ 136; *Persico* Compl. (Doc. No. 1) ¶ 124.

dislikes); *see also Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden where law "leaves ample avenues open . . . to express [an adherent's] deeply-held belief"). Plaintiffs have not alleged that direct provision of insurance is the only way to satisfy their religious obligations—nor could they credibly do so.

The ACA puts all large employers—religious and secular alike—to a choice between providing minimally compliant plans or assuming "[s]hared responsibility" under the statute. 26 U.S.C. § 4980H. Employers can choose to drop their plans for any number of reasons—whether to provide employees with a wider range of coverage choices, to reduce costs, to minimize paperwork, or to maintain religious scruples. There is no reason that RFRA should spare Plaintiffs this choice, simply because religion is part of their decision-making calculus. Like a kosher butcher—who limits his commercial activity for religious reasons and so limits his profits—"[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and

faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261.

### B. The burdens of which Plaintiffs complain are legally insubstantial, whether or not Plaintiffs choose to avoid them.

The Non-Profit Plaintiffs argue that the Accommodation burdens their religious exercise because once they opt out of their obligation to provide contraceptive coverage to their employees, the law shifts that obligation to third parties. *See, e.g.*, *Zubik* Compl. (Doc. No. 1) ¶¶ 112, 115; *Zubik* Mem. in Supp. of Prelim. Inj. (Doc. No. 6) at 7; *Persico* Compl. (Doc. No. 1) ¶ 101; *Geneva College* Compl. (Doc. No. 98) ¶¶ 139, 159. The Diocesan Plaintiffs and Bishops argue that the Accommodation burdens their religious exercise because they must choose between retaining the Non-Profit Plaintiffs as participants in their health trust and thus "facilitating" the provision of contraceptive coverage, or expelling the Non-Profit Plaintiffs and thereby limiting their ability to ensure the Non-Profit Plaintiffs comply with religious directives. *See, e.g., Persico* Mem. in Supp. of Prelim. Inj. (Doc. No. 8) at

41-42. These purported burdens on Plaintiffs' religious exercise are legally insubstantial.

Contrary to the approach urged by Plaintiffs, courts may not properly "assume[ ] that a law substantially burdens a person's exercise of religion when that person so claims." *Geneva College* Mem. in Supp. of Second Mot. for Prelim Inj. (Doc. No. 106) at 7 (quotation marks omitted). Under RFRA, "the government need not justify every action having some effect on religious exercise," because "only *substantial* burdens trigger heightened scrutiny." *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (emphasis in original). Accordingly, as the Seventh Circuit recently noted in rejecting claims much like those before this Court, a burden is not substantial under RFRA simply because a litigant says so; "substantiality . . . is for the court to decide." *Univ. of Notre Dame*, 743 F.3d at 558; *see also Mich. Catholic Conf.*, __ F.3d __, No. 13-2723, 2014 WL 2596753, at *7. Even if a plaintiff's beliefs "are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*,

94 F.3d 1294, 1299 n.5 (9th Cir. 1996). Otherwise, strict scrutiny would arise from "the slightest obstacle to religious exercise," "however minor the burden it were to impose." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

As to the Non-Profit Plaintiffs, "[t]he process of claiming one's exemption from the duty to provide contraceptive coverage is the opposite of cumbersome[;]" it "amounts to signing one's name and mailing the signed form to two addresses." *Univ. of Notre Dame*, 743 F.3d at 558. To accept that the need to put one's objection in writing can itself be a substantial burden on religion would be both "paradoxical and virtually unprecedented." *Id.* at 557. Indeed, Plaintiffs have not cited a single case in which an exemption itself has been found to substantially burden religious practice. *See also* Oral Argument at 27:40, *Univ. of Notre Dame*, 743 F.3d 547 (No. 13-3853), *available at* http://1.usa.gov/1j8c5to (counsel unable to think of such a case).

And while the Non-Profit Plaintiffs claim they cannot assert their objection because that would "trigger" a third party's obligation to take on the responsibilities Plaintiffs have shed, that result inheres in

virtually all religious exemptions. 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 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, must 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 authorization, not from the submission of the form. *See id.* at 554; *Mich. Catholic Conf.*, __ F.3d __, No. 13-2723, 2014 WL 2596753, at *9.

Any burden on the Diocesan Plaintiffs' and Bishops' religious exercise is even more insubstantial. Those Plaintiffs claim that they are religiously compelled to prevent the Non-Profit Plaintiffs from availing themselves of the Accommodation, whether in relation to the Diocesan insurance plan or another plan the Non-Profit Plaintiffs might obtain elsewhere. *See, e.g., Persico* Mem. in Supp. of Prelim. Inj. (Doc. No. 8)

at 41-42. But as a matter of law, the inability to obstruct the actions of third parties cannot substantially burden an adherent's religious exercise. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710, 105 S. Ct. 2914, 2918, 86 L. Ed. 2d 557 (1985) (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.").

The Supreme Court jurisprudence upon which RFRA is based makes clear that Plaintiffs have no religious right to prevent the government from imposing obligations on third parties, whether or not Plaintiffs feel that they "trigger" or "facilitate" those obligations. The plaintiffs in *Bowen v. Roy*, 476 U.S. 693, 696, 699-700 (1986), could not prevent the government from using a social-security number for their daughter, even though they believed that the practice would rob her of her spirit. Those plaintiffs no less "triggered" the government's use of that number by seeking welfare benefits. Similarly, 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).

Likewise here, Plaintiffs' "inability to restrain" a regulatory relationship between the government and third parties that "conflicts with the [their] religious beliefs" does not, as a matter of law, impose a substantial burden on their religious exercise. *Mich. Catholic Conf.*, __ F.3d __, No. 13-2723, 2014 WL 2596753, at *10 (quotation marks omitted). Indeed, Plaintiffs' position "so blurs the demarcation between what RFRA prohibits—that is, governmental pressure to modify one's own behavior in a way that would violate one's own beliefs—and what would be an impermissible effort to require others to conduct their affairs in conformance with plaintiffs' beliefs, that it obscures the distinction entirely." *Roman Catholic Archbishop of Washington v. Sebelius*, __ F. Supp. 2d __, No. 13-1441, 2013 WL 6729515, at *2 (D.D.C. Dec. 20, 2013).

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

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

Not coincidentally, 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 unintended pregnancies end in abortion *Id.* Conversely, carrying an unintended pregnancy to term is associated with low-weight and pre-term births for infants, depression and domestic abuse for mothers, as well as other negative consequences. *See id*. at 103.

These concerns apply with special force to college students like those attending Geneva College, who fall within the age group with the highest rate of unintended pregnancy—accounting for nearly half of all abortions in the United States. *See, e.g.*, Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001-2008*, 104(S1) Am. J. of Pub. Health S43, S44-45 (2014), http://bit.ly/1dEgz7K; Guttmacher Inst., *Fact Sheet: Induced Abortion in the United States* (Feb. 2014), http://bit.ly/ 1bZJLuQ. "Women who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full

social or political participation in their community." Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 Guttmacher Rep. on Pub. Pol'y 5, 6 (2004), http://bit.ly/1j0sEtY. And the high cost of women's preventive services fall especially hard on students, who generally lack full-time employment.

The IOM's Committee on Women's Health Research concluded that these concerns could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." IOM Rep. at 104 (quotation marks omitted). Because "even moderate copayments for preventive services" substantially deter women who might otherwise avail themselves of such services, *id.* at 19, reducing or eliminating costs for contraception leads women to rely on more effective methods, *id*. at 109. Furthermore, as indicated in many public comments that the government received, reducing not just costs, but logistical barriers, further increases women's 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* www.regulations.gov.

These comments and conclusions find support in myriad social-science studies, which demonstrate that even exceedingly low barriers, whether financial or logistical, can deter people from accessing benefits and services. Because "people may decline to change from the status quo even if the costs of change are low and the benefits substantial," "[i]t follows that complexity can have serious adverse effects, by increasing the power of inertia, and that ease and simplification (including reduction of paperwork burdens) can produce significant benefits." Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation* 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.[6]

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%

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[6] 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 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.

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 by 80%, leading researchers to predict that the regulations at issue in this case could "prevent[ ] as many as 41-71% of abortions performed annually in the United States." Sarah Kliff, *Free Contraceptives Reduce Abortions, Unintended Pregnancies. Full Stop.*, Wash. Post, Oct. 5, 2012, http://wapo.st/1ideMhQ.

The Accommodation heeds this social-science data: it seeks to eliminate barriers to contraceptive access by allowing women to receive coverage from their existing healthcare provider while, at the same time, ensuring that religiously affiliated entities are entitled to opt out of covering services that they find objectionable. In contrast, every alternative approach suggested by Plaintiffs would balkanize women's

access to contraception and thereby impede the government's goals. *See, e.g., Zubik* Mem. in Supp. of Prelim. Inj. (Doc. No. 6) at 30; *Persico* Mem. in Supp. of Prelim. Inj. (Doc. No. 8) at 30. The Accommodation thus employs the least restrictive means of advancing compelling governmental interests.

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

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

### A. RFRA was never intended to permit, and the Establishment Clause forbids, religious exemptions that cause significant third-party harms.

If granted, the relief Plaintiffs seek would harm thousands of women. Construing RFRA to permit this result would be inconsistent with the pre-*Smith* Free Exercise jurisprudence upon which RFRA is based, Congress' intent in enacting RFRA, and the Constitution itself.

The Supreme Court's pre-*Smith* jurisprudence reflects careful consideration of third-party harms. In *Lee*, the Court rejected an Amish employer's request for a religious exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." 455 U.S. at 261. And in *Braunfeld*, the Court refused to recognize an exemption to a Sunday closing law because that would have "provide[d] [the plaintiffs] with an economic advantage over their competitors who must remain closed on that day." 366 U.S. at 608-09. In contrast, in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), the Court recognized a right to unemployment benefits that did not "serve to abridge any other person's religious liberties." And the

Court granted an exemption from public-school-attendance requirements in *Yoder*, 406 U.S. at 235-36, only after the Amish parents had demonstrated the "adequacy of their alternative mode of continuing informal vocational education."

When Congress sought to reinstate this jurisprudence in the wake of *Smith*, *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006), it understood this aspect of the law. Thus, when debating RFRA, Congress envisioned exemptions that caused no such third-party harms. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs require it"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (allowing parents to home school their children). None of the exemptions contemplated by Congress would have required third parties to forfeit benefits to which they otherwise would be entitled.

Establishment Clause jurisprudence reflects these same concerns. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court

struck down, on Establishment Clause grounds, a statute that granted employees a right not to work on the Sabbath day of their choosing. The Court reasoned that "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath," and impermissibly bestowed the "right to insist that in pursuit of [one's] own interests others must conform their conduct to [one's] own religious necessities." *Id.* at 709-710 (quotation marks omitted); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.) (sales-tax exemption limited to religious periodicals impermissibly "burden[ed] nonbeneficiaries by increasing their tax bills"). As the Court recently held in upholding the Religious Land Use and Institutionalized Persons Act against an Establishment Clause challenge, any accommodation "must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).[7]

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

Plaintiffs urge an interpretation of RFRA that would override the interests of women who otherwise cannot afford contraceptives. For these women, the regulations at issue provide a lifeline to security in 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). Plaintiffs seek to impede third parties from providing these benefits to a large number of women, *see Zubik* Compl. (Doc. No. 1) ¶¶ 36, 54; *Persico* Compl. (Doc. No. 1) ¶¶ 44, 51, 63; *Geneva College* Compl. (Doc. No. 98) ¶¶ 38, 39, without regard to those women's needs. This does not strike a "measured" balance, *Cutter*, 544 U.S. at 722, and 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 Plaintiffs seek—the ability to prevent employees from receiving access to health benefits from third parties—is not an exemption, as that term is normally understood; rather, it is a veto.

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*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. No such concerns are implicated here.

Plaintiffs' claim that RFRA entitles them to this outcome cannot be reconciled with *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which struck down a law that vested religious organizations with the authority to veto liquor-license applications of nearby establishments. "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 734 (1994) (quoting *Larkin*, 459 U.S. at 127). The *Larkin* Court was particularly troubled by the prospect that a "power ordinarily vested in agencies of government" could be wielded in a manner that was not "religiously neutral." 459 U.S. at 122, 125.

Plaintiffs' interpretation of RFRA is similarly infirm. Delineating access to regulatory benefits is undeniably a "power ordinarily vested in agencies of government." *Id.* at 122. While Plaintiffs may refuse to receive or provide such benefits themselves, they cannot preclude the government from making the benefits available via third-party arrangements. *See Univ. of Notre Dame*, 743 F.3d at 555 (noting that the Accommodation confers rights and obligations on third parties, not

the exempt organization). Plaintiffs seek to redefine the regulatory relationship between affected women, insurers, and the government—for reasons that are admittedly not "religiously neutral." *Id*. at 125. The Constitution forbids this result.

* * *

Privileging Plaintiffs' religious interests over the interests of countless women in obtaining contraceptive coverage—and giving Plaintiffs veto power over the flow of benefits between third parties—would place RFRA at odds with the Establishment Clause. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation and quotation marks omitted). For all of the reasons set forth above, the Court should interpret the statute to disallow the exemption that Plaintiffs seek.

## Conclusion

The lower courts' decisions should be reversed.

Respectfully Submitted,

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I hereby certify to the following:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. The text of the electronic brief is identical to the text of the paper copies to be filed with the Court.

3. The electronic brief has been scanned for viruses, and was found to be virus-free.

4. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

/s/ *Ayesha N. Khan*
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Certificate of Service

On June 17, 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*
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