SCHEDULED FOR ARGUMENT ON MAY 8, 2014

Consolidated Case Nos. 13-5368, 13-5371, 14-5021

In the United States Court of Appeals for the District of Columbia Circuit

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Priests for Life, *et al.*,
Plaintiffs-Appellants,
v.
U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellees.

Roman Catholic Archbishop of Washington, *et al.*,
Plaintiffs-Appellants/Cross-Appellees,
v.
Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellees/Cross-Appellants.

On Appeals from the U.S. District Court for the District of Columbia,
No. 13-1261 (Judge Emmet G. Sullivan), and
No. 13-1441 (Judge Amy Berman Jackson)

Brief in Support of Appellees/Cross-Appellants and Affirmance in Part and Reversal in Part by *Amici Curiae* Americans United for Separation of Church and State and American Civil Liberties Union

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Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rule 28, counsel for *amici curiae* certifies:

A. Counsel for *amici curiae* adopts Appellees/Cross-Appellants' statement of parties and *amici*.

B. Counsel for *amici curiae* adopts Appellees/Cross-Appellants' statement of rulings under review.

C. Counsel for *amici curiae* adopts Appellees/Cross-Appellants' statement of related cases.

D. All pertinent statutes and regulations are contained in Appellants/Cross-Appellees' addendum.

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

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuits Rules 26.1 and 29(b), counsel for *amici curiae* makes the following disclosures:

Americans United for Separation of Church and State and the American Civil Liberties Union are organizations committed to advancing civil rights and civil liberties, including the freedom of religion provided by the First Amendment to the U.S. Constitution.

None of *amici* has any parent company. No publicly-held corporation has a 10% or greater ownership interest in any of *amici*.

Certificate in Support of Separate Brief

Pursuant to Circuit Rule 29(d), a separate brief is necessary to convey the specific interest of *amici* as organizations focused on protecting and advancing the freedom of religion and the separation of church and state, as secured by the First Amendment to the U.S. Constitution.

The accompanying brief of *amici* develops lines of argument that are relevant to the case but distinct from the positions taken by the United States. This brief presents points of law and other information regarding 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.

Furthermore, *amici* have substantial experience representing the interests of diverse religious traditions and addressing the intersection of religious liberty and reproductive rights. Counsel for *amici* is

unaware of any party or other *amicus* before the Court that can supply these unique perspectives.

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

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ACA	Affordable Care Act
ACLU	American Civil Liberties Union
Archdiocese	Appellant/Cross-Appellee Roman Catholic Archbishop of Washington
ERISA	Employee Retirement Income Security Act
HHS	U.S. Department of Health and Human Services
IOM	Institute of Medicine
Plaintiffs	All parties challenging the Accommodation in this consolidated appeal, including Cross-Appellee Thomas Aquinas College
RCAW	Roman Catholic Archbishop of Washington
RFRA	Religious Freedom Restoration Act
RLUIPA	Religious Land Use and Institutionalized Persons Act

Statement of Identity, Interest in Case, and Source of Authority to File

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 many thousands 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). But 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 (7th Cir. 2014).

The **American Civil Liberties Union** is a nationwide, non-profit, non-partisan public-interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution and the nation's civil-rights laws. The ACLU 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 Circuit Rule 29(b), *amici* have concurrently filed a motion requesting leave to file this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

Background

A. The Regulations

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 all large employers 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* (2013), 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 health plans to include contraceptives in the battery of covered preventive services. *See* 42 U.S.C. § 300gg-13a; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012)

B. The Accommodation

Before finalizing the regulations and after extensive comment, HHS sought to accommodate the objections of religious organizations to the contraceptive-coverage requirement. HHS exempted houses of worship from the requirement upon finding that they "are more likely than other employers to employ people of the same faith who share the same objection" and their employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Other religious non-profit organizations were permitted to opt

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

out of providing contraceptive coverage by certifying their religious objection to their insurance administrator or provider. *See id.* at 39,873-74. In the event of such an opt out, the administrator or provider must assume responsibility for offering 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).

C. Proceedings Below

Plaintiffs are the Roman Catholic Archbishop of Washington ("Archdiocese"), seven non-profits affiliated with the Archdiocese ("Diocesan Plaintiffs"), Priests for Life, Catholic University of America, Thomas Aquinas College, and several individuals. Joint Appendix ("JA") 11-12, 206-08. The Archdiocese is exempt altogether from any requirement to provide contraceptive coverage. JA 462. The Diocesan Plaintiffs insure their employees through the Archdiocese's self-insured church plan, which is exempt from the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. (1974). Pls.' Br. 15, 32. Priests for Life and Catholic University insure their employees through United Healthcare, and Catholic University makes insurance

available to students through AETNA. *Id.* at 11, 15. Thomas Aquinas College insures its employees through a self-insured plan administered by a third-party administrator. *Id.* at 16. The Diocesan Plaintiffs, Priests for Life, Catholic University, and Thomas Aquinas College are all entitled to avail themselves of the Accommodation.

Plaintiffs challenged the Accommodation in two lawsuits, consolidated on appeal, that asserted claims 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."[2] Plaintiffs identify a burden in the Accommodation's requirements that they (1) submit a certification form that, in their view, authorizes the provision of religiously objectionable services, and (2) maintain a relationship with an insurer that provides those objectionable services. Pls.' Br. 25, 41.

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[2] Plaintiffs brought constitutional claims as well. *See* Pls.' Br. 48-69. Because the government has adequately disposed of those claims, U.S. Br. 46-56, this brief focuses only on the RFRA claim.

In *Roman Catholic Archbishop of Washington*, the court granted the government summary judgment with respect to Catholic University's RFRA claim, and granted the government's motion to dismiss the RFRA claims asserted by the Diocesan Plaintiffs. JA 450-51.[3] The court granted Thomas Aquinas College summary judgment on its RFRA claim, concluding that a self-insured entity's obligation under the Accommodation to contract with a willing third-party administrator requires it to act in furtherance of "an end that is inimical to its beliefs." *Id.* at 453, 490. The court rejected the notion, however, that self-certification itself constitutes a substantial burden on Plaintiffs' religious exercise. That argument, the court explained, "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 plaintiff's beliefs, that it obscures the distinction entirely." *Id.* at 452.

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[3] The Archdiocese was not joined in Plaintiffs' RFRA claim because it is exempt from the challenged regulations. *See* JA 465-66.

In *Priests for Life*, the court dismissed Plaintiffs' claims in their entirety. *Id.* at 182. The court reasoned that"[t]he accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party—namely, the issuer—and Priests for Life plays no role in that activity." *Id.* at 161-62. Ultimately, "an adherent is not substantially burdened by laws requiring third parties to conduct their internal affairs in ways that violate his beliefs." *Id.* at 157.[4]

On Plaintiffs' motion, a divided panel of this Court granted injunctions pending appeal. *Id.* at 554. Thereafter, the Supreme Court denied Plaintiffs' petitions for writs of certiorari before judgment. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-829 (S. Ct.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-891 (S. Ct.).

[4] The court further concluded that the individual Plaintiffs' claims are coextensive with the claims asserted by Priests for Life and thus need not be separately considered. *See* JA 150-51. Plaintiffs have not challenged that holding on appeal.

Argument

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

Demonstrating a substantial 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). To meet this burden, Plaintiffs must demonstrate that the challenged regulation "forces [them] to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

Plaintiffs have failed to make the required showing. First, they can discontinue their health-insurance plans and thereby avoid religious injury altogether. Second, even if they maintain their insurance plans and pursue the Accommodation, they would suffer no legally cognizable burden, as the Accommodation imposes obligations on insurers and administrators, not on objecting employers.

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

This Court has taken care to "avoid[ ] expanding RFRA's coverage beyond what Congress intended" and to "prevent[ ] RFRA claims from being reduced into questions of fact." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Accordingly, under this Court's precedent, a substantial burden exists only when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quotation marks omitted); *see also Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013) (same). "An inconsequential or *de minimis* burden on religious practice does not rise to this level . . . ." *Kaemmerling*, 553 F.3d at 678.

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). Thus, the Court rejected a challenge by Orthodox Jewish businessmen to a Sunday closing law that allegedly 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*, 493 U.S. 378, 392 (1990) (no "constitutionally significant burden" where tax does not "effectively choke off an adherent's religious practices").

In a similar vein, when adherents have a viable alternative means to satisfy their religious obligations—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). In *Henderson*, this Court upheld a federal regulation banning the sale of t-shirts on the National Mall, despite the plaintiffs' religious obligation to preach "to

the whole world . . . by all available means." 253 F.3d at 16 (quotation marks omitted). The limited ban on solicitation imposed only an incidental burden on the plaintiffs' religious exercise, because they could still "distribute t-shirts for free on the Mall, or sell them on the streets surrounding the Mall." *Id.* at 16-17. Likewise, in *Mahoney*, the Court found no substantial burden in disallowing a chalk demonstration in front of the White House, because the plaintiff could "still spread his message through picketing, a public prayer vigil, or other similar activities," or engage in chalk demonstrations elsewhere in the city. 642 F.3d at 1120-21.

Here, too, Plaintiffs have failed to demonstrate that the Accommodation prevents them from complying with their religious principles. Although they present their "stark choice" as one between "violat[ing] their religious beliefs or suffer[ing] penalties, including crippling fines," Pls.' Br. 29, 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 fraction of what they currently spend on health insurance.

The pertinent provision is titled "Shared responsibilities for employers regarding health coverage." 26 U.S.C. § 4980H. If an employer does not offer health insurance, its employees become eligible for public health-insurance subsidies. When an eligible employee applies for subsidized health insurance on the public exchanges, and her employer has more than 50 employees, the employer becomes obligated to make "assessable payments" to the IRS amounting to $2,000 per employee (discounting the first 30 employees) per year. *Id.*[5]

The payment is a tax, in both name, *see id.* § 4980H(c)(7), and substance. The assessable payments generate governmental revenue, and so present the essential feature of a tax. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 96 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013). The tax is

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[5] Some of the Plaintiffs here may discontinue their health coverage without paying anything at all. *See* JA 499 n.24. Don Bosco Cristo Rey High School and the Catholic Information Center have fewer than 50 employees. *Id.* at 408, 427. And nothing in the ACA, or any other law, requires colleges or universities to provide health-care coverage to students.

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.

Contrary to Plaintiffs' claim that the tax imposes "onerous penalties," Pls.' Br. 23, the assessable payment amounts to less than half the average per-employee cost of employer-provided healthcare in the District of Columbia ($4,489). *See* Henry J. Kaiser Family Found., *Average Single Premium per Enrolled Employee for Employer-Based Health Insurance* (2012), http://bit.ly/1eVfSK6. Thus, because the tax is paid instead of healthcare-insurance premiums, choosing to pay the tax would accrue to Plaintiffs' financial benefit. The law therefore "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." *Liberty Univ.*, 733 F.3d at 98 (emphasis added).[6]

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

Many view the latter option as preferable, as recognized by a publication of the University of Notre Dame, itself a plaintiff in parallel litigation. *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. Indeed, under the new regulatory regime, in which insurance coverage is available at affordable rates, irrespective of age or preexisting conditions, discontinuing health insurance has become a more feasible alternative for many employers.

Plaintiffs' brief cites multiple affidavits to support the assertion that "ruinous practical consequences" would arise if they were to discontinue their insurance coverage. Pls.' Br. 29. But these affidavits neither specifically contend with the $2,000 tax, nor 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

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Swaggart Ministries, 493 U.S. at 391.

insurance on the exchanges. *See, e.g.*, JA 51-52 (Fr. Pavone Decl. ¶¶ 39, 41); *id.* at 282 (Conley Aff. ¶ 15). Rather, the affidavits assert wanly that discontinuing health coverage would place Plaintiffs "at a competitive disadvantage" or otherwise hinder their ability to retain employees or students. *E.g.*, *id.* at 282 (Conley Aff. ¶ 15). Far from establishing a likelihood of success on the merits necessary for equitable relief, such conclusory allegations are insufficient to state a claim "above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). At most, these unsupported assertions suggest that Plaintiffs' religious practice may be made marginally "more expensive" or inconvenient. *Braunfeld*, 366 U.S. at 605.

The ACA puts all large employers, religious and secular alike, to a choice: provide minimally compliant plans or assume "[s]hared responsibility" under the statute. 26 U.S.C. § 4980H. Employers may drop their plans for any number of reasons—whether to provide employers with a wider range of coverage choices, reduce costs and paperwork, or 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. The Accommodation does not impose a substantial burden on Plaintiffs' religious exercise.

Even if Plaintiffs were somehow required to retain their medical-insurance plans and avail themselves of the Accommodation, their religious exercise would still not be substantially burdened. A burden is not substantial under RFRA simply because Plaintiffs say so; "substantiality . . . is for the court to decide." *Univ. of Notre Dame*, 743 F.3d at 558. Thus, in *Kaemmerling*, this Court distinguished between the factual recitation of a plaintiff's religious beliefs, which the Court "accept[ed] as true," and "the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." 553 F.3d at 679.

Although Plaintiffs' beliefs may be "sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996).

Otherwise, strict scrutiny would arise from "the slightest obstacle to religious exercise," "however minor the burden it were to impose." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). "Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from . . . restrictions of any kind." *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

1. The Non-diocesan Plaintiffs may avail themselves of the Accommodation and avoid any obligation to provide contraception coverage.

Priests for Life and Catholic University insure their employees through group health plans issued by United Healthcare, and the university insures its students through AETNA. JA 225; Pls.' Br. 11, 15. Thomas Aquinas College offers coverage to employees through a self-funded plan that is administered by the RETA Trust. JA 228-29. In order to avail themselves of the Accommodation, these Plaintiffs need only provide certification of their religious objection to their insurance company or third-party administrator, 29 C.F.R. §§ 2590.715-

2713A(b)(1), (c)(1); upon doing so, these third parties must make contraception coverage available without imposing cost-sharing requirements on Plaintiffs. This self-certification process therefore permits an "organization [to] raise[ ] its hand and say[ ] 'I object' to participating in the provision of contraceptive services itself." JA 482. "[S]igning the form . . . shifts the financial burden from [Plaintiffs] to the government." *Univ. of Notre Dame*, 743 F.3d at 555.

Although the Accommodation permits Plaintiffs to "declare[ ] [their] intention to step out of the process," JA 481, and avoid any obligation to provide contraception coverage, Plaintiffs argue that the mere act of certifying their religious objection "turn[s] on the tap" and makes them "a vehicle for the delivery of [contraceptive] products and services." Pls.' Br. 27, 41. But as the Seventh Circuit recently explained, Plaintiffs' "vehicle" theory is misguided: "Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." *Univ. of Notre Dame*, 743 F.3d at 554. 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.

The Accommodation permits Plaintiffs to do what they have always done: notify their insurance company or third-party administrator of their religious objection and subsequently refuse to provide contraceptive coverage. *See* Pls.' Br. 40 ("Plaintiffs [have] always entered into contractual arrangements barring third parties from providing [contraceptive] products and services to their plan beneficiaries."). Plaintiffs concede that they provided such notification before filing this lawsuit, and that they would do so even if they were to prevail. The only thing that changed with the passage of the ACA is that their insurer or administrator will now step in to provide the contraceptive coverage that otherwise would have been unavailable to Plaintiffs' employees.

Plaintiffs assert 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 Plaintiffs oppose." 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 cause the government to draft another in his place. *Cf. Univ. of Notre Dame*, 743 F.3d at 556 (observing that Plaintiffs' position necessarily leads to this result). A judge who seeks recusal from a death-penalty case cannot claim a RFRA right to refuse to recuse in writing so as to avoid facilitating the assignment of a new judge to preside.

Those claims, like this one, should fail. The authorization for a new judge's assignment, another soldier to be drafted, and contraceptives to be covered does not arise from the form; the form *relieves* the conscientious objectors from providing the objectionable services. The authorization comes from the government, which has chosen, in the event of an opt-out, to place a coverage obligation on insurers and administrators.

No matter how sincere Plaintiffs' religious objection to contraceptives may be, an adherent is not substantially burdened by laws requiring third parties to behave in ways that violate his beliefs.

See JA 157. The Native Americans in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), could not disrupt a governmental forestry project, even one that would "virtually destroy [their] ability to practice their religion." *Id.* at 451 (quotation marks omitted). The plaintiffs in *Bowen v. Roy*, 476 U.S. 693, 696, 699-700 (1986), could not prevent the government from using a social-security number for their daughter, even though they believed that the practice would rob her of her spirit.

This Court has heeded those rulings, recognizing that "a plaintiff cannot satisfy his burden under RFRA if the [challenged] government regulation requires a third party, and not the plaintiff, to act in a way that violates the plaintiff's religious beliefs." JA 472. In *Kaemmerling*, the Court rejected the claim of a prisoner who challenged the DNA testing of his blood, because the plaintiff objected not to the extraction of his blood *per se*, but to the government's testing of that blood for DNA. *See* 553 F.3d at 679. The Court reasoned that the objected-to practice was one step removed from the plaintiff's religious exercise: "The extraction and storage of DNA information are entirely activities

of the FBI, in which [the plaintiff] plays no role and which occur after the [government] has taken his fluid or tissue sample." *Id.* And here, as in *Kaemmerling*, it is "the subsequent actions of third parties—the government's and the issuer's provision of contraceptive services, in which [Plaintiffs] play[ ] no role—that animate [their] religious objections." JA 164.

Nor should Plaintiffs' misplaced reliance on *Gilardi* carry the day. In *Gilardi*, the Court found a substantial burden in regulations that required contraception to be included in companies' health-insurance plans. 733 F.3d at 1217-19. The burden arose "when a company's owners fill the basket of goods and services that constitute a healthcare plan," and when the owners must "meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans." *Id.* at 1217-18. By contrast, the Accommodation *relieves* Plaintiffs of that obligation; it allows them to remove contraception altogether from their "basket of goods." *Id.* at 1217. Thus, Plaintiffs are not being asked to carpool with a bank-robber; the Accommodation permits them to decline the ride. *Cf.* Pls.' Br. 43.

Thomas Aquinas College is not entitled to a different outcome merely because the college provides health insurance through a self-funded plan, rather than through an insurance carrier. The college neither designates nor authorizes its third-party administrator to serve as the plan administrator; the government does. *See Univ. of Notre Dame*, 743 F.3d at 555. The self-certification simply reminds the administrator "of an obligation that the *law*, not [Plaintiffs], imposes on it." *Id.* (emphasis in original). And nowhere has the college asserted that its third-party administrator will, or is even likely to, terminate its contract. Thus, "the 'burden' alleged by [Plaintiffs] is entirely speculative and so not a ground for equitable relief." *Id.* at 557; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 104-05 (1983) (speculative harm inadequate to establish an "actual controversy"). Furthermore, if the College is uncomfortable with the Accommodation, nothing precludes it from using an insurance company rather than self-insuring its employees—an alternative that likewise defeats any claim that the regulations leave it with no viable alternatives.

2. The Diocesan Plaintiffs lack standing.

The Diocesan Plaintiffs insure their employees through the Archdiocese's "church plan," which is expressly exempt from ERISA's ambit. *See* 29 U.S.C. § 1003(b)(2). Because the government's authority to enforce the regulations derives from ERISA, a church plan's third-party administrator likewise has no legal obligation to provide contraception, *see* 78 Fed. Reg. at 39,879-80, and the Diocesan Plaintiffs are not required to switch administrators. *See Roman Catholic Archbishop of Washington* ("RCAW"), R. 40, Defs.' Resp. to Court Order, at 3. Thus, even under Plaintiffs' flawed "vehicle" theory, the Diocesan Plaintiffs have not alleged a legally cognizable injury because their self-certification will not "facilitate access to the objectionable coverage." Pls.' Br. 23, 41. Indeed, these Plaintiffs have failed to demonstrate that *any* injury is possible, much less "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Even if this Court were to conclude that the Diocesan Plaintiffs' obligation to give notice of their religious objection provides sufficient

injury to confer standing, the provision of such notice does not itself substantially burden these Plaintiffs' religious exercise, as explained in Section I.B.1.

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

Even if the regulations were deemed to substantially burden Plaintiffs' religious exercise, they should still be upheld because they withstand strict scrutiny. There are specific and compelling reasons to apply the challenged regulations to Plaintiffs: providing Plaintiffs' employees and students with access to a benefit essential to their well-being; reducing unintended pregnancies and, in turn, the need for abortions; and ensuring that female employees and students do not face substantially higher costs than their male counterparts in meeting healthcare needs. Removing cost and logistical barriers, and thereby equipping women with the tools to decide whether and when to become parents, is the least restrictive means of ensuring that women can participate equally in society.

Although Plaintiffs assert that the question of strict scrutiny is foreclosed by *Gilardi, see* Pls.' Br. 22,[7] the Accommodation merits separate attention. *Gilardi* addressed whether for-profit companies and their owners could be required to provide contraceptive coverage without cost-sharing under the companies' health-insurance plan; the majority reasoned that the government's interests were insufficient to "extend to the compelled subsidization of a woman's procreative practices," and that the for-profit contraceptive-coverage requirement was fatally underinclusive. 733 F.3d at 1221-23. Plaintiffs' interests, however, are comparatively minimal—the Accommodation alleviates the requirement for religious nonprofits to subsidize contraception—while the government's interests in ensuring the health and welfare of women, and in redressing gender inequities, remain paramount. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). And *Gilardi* involved employees of for-profit companies; it did not

[7] The government preserved this question, *see* RCAW, R. 31, Defs.' Combined Mem. in Opp. to Pls.' Cross-Mot. for Summ. J., at 17, and the district court itself expressed doubt regarding *Gilardi*'s application to the Accommodation, JA 494 n.21.

involve students, who have an especially acute need for access to contraceptives. *See infra* pp. 29-30.

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

Consequently, the United States has a much higher rate of unintended pregnancy than other developed nations, accounting for *nearly half* of all pregnancies in the nation. IOM Rep. at 102. Forty-two

percent of these women obtain an abortion, *id*., while others carry to term a child for which they may be unprepared. Some may be unaware of their pregnancy at first and unwittingly cause harm to themselves or to their fetus. *Id*. at 103.

These considerations apply with special force to college students, who have the highest rate of unintended pregnancy, and account 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. If a student carries an unintended pregnancy to term, the consequences remain dire for mother and child. *See, e.g.*, IOM Rep. at 103 (unintentionally conceived infant more likely to be born prematurely). In contrast, "[w]omen 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 problems could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." IOM Rep. at 104 (quotation marks omitted). Because "even moderate copayments for preventive services" substantially deter women who might otherwise avail themselves of such services, *id.* at 19, reducing or eliminating costs for contraceptives causes women to rely on more effective methods, *id.* at 109. Furthermore, as indicated in many public comments that the government received, reducing not just costs, but logistical barriers, further increases women's access to needed contraceptives. *See, e.g.,* Hal C. Lawrence, *Comment of the American Congress of Obstetricians and Gynecologists Re: NPRM: Certain*

Preventive Services Under the Affordable Care Act, CMS-9968-P, April 8, 2013, *available at* www.regulations.gov.

These comments and conclusions find support in myriad social-science studies, which demonstrate that even exceedingly low barriers, whether financial or logistical, can deter people from accessing benefits and services. Because "people may decline to change from the status quo even if the costs of change are low and the benefits substantial," "[i]t follows that complexity can have serious adverse effects, by increasing the power of inertia, and that ease and simplification (including reduction of paperwork burdens) can produce significant benefits." Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation* (Feb. 16, 2013), Oxford Handbook of Behav. Econ. & the Law (Eyal Zamir & Doron Teichman eds.) (forthcoming), http://ssrn.com/abstract=2220022.

Indeed, removing minor cost or logistical barriers can dramatically increase consumption. *See* Kristina Shampan'er & Dan Ariely, *Zero as a Special Price: The True Value of Free Products* (2007), http://bit.ly/1iy2eSp. When Amazon inadvertently imposed a 10-cent

shipping price for goods sent to one European country, while dropping the shipping price to zero for other countries, sales soared in the latter context and remained largely unchanged in the former. *Id.* at 40. Similarly, moving a bowl of food mere inches away, or making food more difficult to eat by changing the utensil provided, can lead to a substantial decrease in consumption. Paul Rozin et al., *Nudge to Obesity I: Minor Changes in Accessibility Decrease Food Intake*, 6 Judgment & Decision Making 323 (2011), http://bit.ly/1jPM20r. One study found that if employees are faced with a default rule in which they automatically contribute 3% of their income to a 401(k) plan, very few employees opt out; but a majority of employees will not make any contributions in the absence of an enrollment-by-default rule. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. of Econ. 1149 (2001), http://bit.ly/1ftWFDi.

Women's use of contraception reflects this phenomenon. One study showed that when condom prices rise from zero to merely 25 cents, sales decline by 98%. *See* Deborah Cohen et al., *Cost as a Barrier*

to Condom Use: The Evidence for Condom Subsidies in the United States, 89 Am. J. of Pub. Health 567, 567 (1999), http://1.usa.gov/1b1Q1gV. And making oral contraceptives only slightly less convenient (dispensing them quarterly rather than annually) resulted in a 30% greater chance of unintended pregnancy, and a 46% greater chance of abortion. *See* Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 Obstetrics & Gynecology 566, 566 (2011), http://bit.ly/1ebyZRQ.

By contrast, in another study, when the most convenient forms of contraception—those requiring the least effort to maintain—were made available at no cost to young women, the rate of unintended pregnancy dropped by 80%, leading researchers to predict that the regulations at issue in this case could "prevent[ ] as many as 41-71% of abortions performed annually in the United States." Sarah Kliff, *Free Contraceptives Reduce Abortions, Unintended Pregnancies. Full Stop.*, Wash. Post, Oct. 5, 2012, http://wapo.st/1ideMhQ.

The regulations heed this social-science data; they seek 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 contraceptives. *See, e.g.*, RCAW, R. 6-1, Mem. in Supp. of Pls.' Mot. for Prelim. Inj., at 28-29. The Accommodation therefore constitutes the least restrictive means to accomplish the government's compelling goals.

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

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

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

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

The Establishment Clause forbids recognition of religious exemptions that override other significant interests. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court struck down a statute that granted employees a right not to work on the Sabbath day of their choosing. The Court reasoned that "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath," and impermissibly bestowed the "right to insist that in pursuit of [one's] own interests others must conform their conduct to [one's] own religious necessities." *Id.* at 709-710 (quotation marks omitted); *see also Texas Monthly, Inc. v. Bullock*,

489 U.S. 1, 18 n.8 (1989) (plurality op.) (sales-tax exemption limited to religious periodicals impermissibly "burden[ed] nonbeneficiaries by increasing their tax bills"). As the Court recently held in upholding RLUIPA against an Establishment Clause challenge, any accommodation "must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

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

v. Yoder, 406 U.S. 205, 235-36 (1972), only after the Amish parents had demonstrated the "adequacy of their alternative mode of continuing informal vocational education."[8]

Plaintiffs urge an interpretation of RFRA that would override the interests of women who otherwise cannot afford contraceptives. For these women, the regulations at issue provide a lifeline to security in 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). Granting Plaintiffs the relief they seek would inflict widespread harm on the thousands of female students and employees that Plaintiffs insure. *See, e.g.*, JA 200. That result cannot be squared with the Establishment Clause.

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

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; it is a veto. Plaintiffs seek to prevent the "actions of third parties—the government's and the issuer's provision of contraceptive services—in which [Plaintiffs] play[ ] no role." JA 164. Plaintiffs' claim that RFRA entitles them to this outcome cannot be reconciled with *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which struck down a law that vested religious organizations with the authority to veto liquor-license applications of nearby establishments. "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 734 (1994) (quoting *Larkin*, 459 U.S. at 127). The *Larkin* Court was particularly troubled by the prospect that a "power ordinarily vested in agencies of government" could be wielded in a manner that was not "religiously neutral." 459 U.S. at 122, 125.

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

* * *

Privileging Plaintiffs' religious interests over the interests of countless women in obtaining contraceptive coverage—and giving Plaintiffs veto power over the flow of benefits between third parties—would place RFRA at odds with the Establishment Clause. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S.

289, 299-300 (2001) (citation and quotation marks omitted). For all of the reasons set forth above, the Court should interpret the statute to disallow the exemption that Plaintiffs seek.

Conclusion

The judgment of the district court in *Priests for Life* should be affirmed. The judgment of the district court in *Roman Catholic Archbishop of Washington* should be affirmed insofar as the court ruled in the government's favor, and reversed insofar as the court ruled in favor of the Plaintiffs.

Respectfully submitted,

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Certificate of Compliance

I hereby certify to the following:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,928 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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

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

On April 2, 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 appellate CM/ECF system.

/s/ *Ayesha N. Khan*
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